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## From Slavery and Seminoles to AIDS in South Africa: An Essay on Race and Property in International Law

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FROM SLAVERY AND SEMINOLES TO AIDS IN SOUTH AFRICA:  
AN ESSAY ON RACE AND PROPERTY IN INTERNATIONAL LAW

NATSU TAYLOR SAITO\*

TABLE OF CONTENTS

I. INTRODUCTION: CRITICAL RACE THEORY, INTERNATIONAL LAW AND PROPERTY RIGHTS.....	1136
II. SLAVERY AND SEMINOLES: PEOPLE AS PROPERTY .....	1142
A. <i>Setting the Stage: Maroons Before 1776</i> .....	1142
B. <i>Slavery and International Law in the New Nation</i> .....	1145
C. <i>The Seminole Wars: Liberty or Death</i> .....	1150
III. THE INFLUENCE OF SLAVEHOLDING INTERESTS ON LAW AND POLICY.....	1160
A. <i>Shaping International Law to Promote Slavery</i> .....	1160
B. <i>Violating International Law to Expand Slavery</i> .....	1163
C. <i>The Federal Government as Slaveholder</i> .....	1166
IV. THE LEGACY OF SEMINOLE POLICY: DAVIS V. UNITED STATES.....	1168
V. PARALLELS TO SEMINOLE POLICY: INTELLECTUAL PROPERTY LAW AND POLICY.....	1174
A. <i>Expanding the Definition of "Property" Again</i> .....	1175
B. <i>Exporting the U.S. Intellectual Property Regime</i> .....	1179
C. <i>AIDS Drugs: Hostage to Profits</i> .....	1186
VI. CONCLUSION: RACE, PROPERTY AND PROFIT .....	1191

*"Communities, like individuals, often exhibit in early life those character-  
istics which distinguish their mature age, and become ruling passions  
when senility marks the downhill of life."*

—Cong. Joshua R. Giddings<sup>1</sup>

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\* © 1999, 2000 by Natsu Taylor Saito, Associate Professor, Georgia State University College of Law. Special thanks to Kelly Jordan for bringing the Seminole story back to my attention and for tireless editing; to Peter Philips for pointing out the connection between the laws of slavery and intellectual property; to Ruth Gordon, the *Villanova Law Review* and the other participants for creating this Symposium; and to Keith Aoki for sharing his expertise in intellectual property law. I am grateful to the Georgia State University College of Law for support of this research and to my research assistant, Nick Rurua. This essay is dedicated to the memory of Chimurenga Karega Seminole Jenga.

1. JOSHUA R. GIDDINGS, THE EXILES OF FLORIDA: OR, THE CRIMES COMMITTED BY OUR GOVERNMENT AGAINST THE MAROONS, WHO FLED FROM SOUTH CAROLINA AND OTHER SLAVE STATES, SEEKING PROTECTION UNDER SPANISH LAW 6 (1858).

I. INTRODUCTION: CRITICAL RACE THEORY, INTERNATIONAL LAW  
AND PROPERTY RIGHTS

IN August 1790, George Washington signed the Treaty of New York, a treaty with the Creek Nation which purported to clarify the boundary between the state of Georgia and Creek lands.<sup>2</sup> It was the first treaty entered into by the United States under its new Constitution, later characterized by Ohio Congressman Joshua R. Giddings as the “title-page of our diplomatic history.”<sup>3</sup>

Like other treaties with Indian nations, the Treaty of New York forced the Creeks to cede lands and imposed on them a peculiarly European understanding of property ownership.<sup>4</sup> Under this view, white settlers had the right to take land from Indians who, from the European perspective, did not properly value it or put it to productive use even if, in the words of Chief Seattle, the Indians considered holy “every shining pine needle, every sandy shore, every mist in the dark woods, every clearing, and humming insect.”<sup>5</sup> This perspective is reflected in Article XII of the Treaty, which said the United States would provide farming implements so that “the Creek nation may be led to a greater degree of civilization and become herdsmen and cultivators, instead of remaining in a state of hunters.”<sup>6</sup>

The Treaty of New York is thus an example of how, as Joseph Singer has argued, “[t]he history of United States law, from the beginning of the nation to the present, is premised on the use of sovereign power to allocate property rights in ways that discriminated—and continue to discriminate—against the original inhabitants of the land.”<sup>7</sup> However, this first treaty did more than impose the white settlers’ system of land ownership on the Creeks, it also imposed on the Creeks the settlers’ racial hierarchy and laws that defined people as property.

The Treaty provided that the Creeks were to “deliver, as soon as practicable, . . . all citizens of the United States, white inhabitants or negroes,

2. Treaty of New York, Aug. 7, 1790, art. I, 7 Stat. 33-35, 2 INDIAN AFFAIRS: LAWS AND TREATIES 23-25 (Charles Kappler compiler & ed., 1904) [hereinafter INDIAN AFFAIRS] (proclaimed Aug. 13, 1790). See generally FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1994) (treaty is reproduced on unnumbered page following page 144).

3. GIDDINGS, *supra* note 1, at 12.

4. See generally Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence*, 1986 WIS. L. REV. 219.

5. Singer, *supra* note 4, at 1 (citing Chief Seattle, *Suquamish Tribe*, 16 HUM. RTS. Q. 34 (Winter 1989-1990) (letter to President Franklin Pierce)). Thus, the United States Supreme Court could hold in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), that land held under original Indian title was not “property” protected by the Fifth Amendment to the Constitution. See Singer, *supra* note 4, at 17-18 (discussing *Tee-Hit-Ton Indians* case).

6. PRUCHA, *supra* note 2, at 83.

7. Singer, *supra* note 4, at 44-45.

who are now prisoners in any part of said nation.”<sup>8</sup> The United States interpreted this to mean that the Creeks not only had to return fugitive slaves, but were supposed to capture Black Seminoles, many of whom had been free for generations, and turn them over to the United States to be enslaved.<sup>9</sup> This Treaty illustrates a pattern which has continued to the present day, i.e., the use of international law by the United States to enforce its particular system of property rights, a system inextricably related to the maintenance of racial hierarchy.<sup>10</sup>

This symposium focuses on the intersection of critical race theory, which endeavors to analyze the influence of race and racism in the legal system,<sup>11</sup> and international law. Although these bodies of law and theory are usually regarded as separate disciplines, when we look at race and racism in American law and the relationship of our government and domestic legal system to international law—how we shape and promote, as well as disregard, the global rule of law—we see that these two areas not only intersect, but have been inextricably related throughout U.S. history.<sup>12</sup>

The United States government was formed to protect and promote the interests of a relatively small group of people.<sup>13</sup> This was accom-

8. GIDDINGS, *supra* note 1, at 12.

9. For a discussion of the Treaty of New York, see *infra* notes 54-58 and accompanying text.

10. According to Joseph Singer:

Property in the United States is associated with a racial caste system. Nor is this a phenomenon of the past; the law continues to confer—and withhold—property rights in a way that provides less protection for property rights to American Indian nations in crucial instances than is provided for non-Indian individuals and entities.

Singer, *supra* note 4, at 44. He continues, “Nor is this lesson confined to American Indian nations. Black Americans, torn from Africa, placed in slavery, and then ‘freed,’ were never given the land, education, and other resources that had been available to many other Americans.” *Id.* at 45.

11. For works forming the core of critical race theory, see generally KIMBERLÉ W. CRENSHAW ET AL., *CRITICAL RACE THEORY: THE WRITINGS THAT FORMED THE MOVEMENT* (1996); RICHARD DELGADO, *CRITICAL RACE THEORY: THE CUTTING EDGE* (1995); and RICHARD DELGADO & JEAN STEFANCIC, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

12. See generally Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988) (relating civil rights movement of 1950s and 1960s to U.S. foreign policy interests); Mary L. Dudziak, *The Little Rock Crisis and Foreign Affairs: Race, Resistance, and the Image of American Democracy*, 70 S. CAL. L. REV. 1641 (1997) (arguing that government’s concern for its international image affected nature of change brought about by civil rights movement); Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT’L L. & POL’Y 903 (1997) (using critical race theory to analyze “failed states”); Henry J. Richardson III, *African Americans and International Law: For Professor Goler Teal Butcher, With Appreciation*, 37 HOW. L.J. 217 (1994) (illustrating contributions of international lawyers of color); Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT’L L. 42 (1993) (discussing importance of international law to African-Americans).

13. See generally HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES, 1492-PRESENT*, at chs. 1-5 (1995); CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION*

plished in part by the creation of a system of laws particularly favorable to property interests, and by defining "property" under the law to include human beings.<sup>14</sup> The emergence of "race"<sup>15</sup> and racism in the United States must be understood in the context of an economic system heavily dependent upon slave labor. One cannot understand the United States Constitution without knowing that it owes its existence to the elaborate protections of slavery built into it.<sup>16</sup> Similarly, to understand the United States' complex and contradictory relationship to international law, it is important to know that many of our first encounters with international law, including our first treaties, wars and violations of other nations' sovereignty, were rooted in a determination to protect the institution of slavery and the economic interests of slaveholders.<sup>17</sup>

The relationship between race, economics and international law that was forged in the very earliest moments of our country's history is illus-

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OF THE CONSTITUTION OF THE UNITED STATES (1913) (assessing the economic interests of the framers).

14. See generally Donald G. Nieman, *From Slaves to Citizens: African-Americans, Rights Consciousness, and Reconstruction*, 17 CARDOZO L. REV. 2115 (1996); A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD (1978).

15. . Many people have addressed the construction of "race" and "races" in the United States. See generally MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (2d ed. 1994); IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996); John A. Powell, *The Raging of American Society: Race Functioning As a Verb Before Signifying As a Noun*, 15 LAW & INEQ. 99 (1997); Anthony Appiah, *The Uncompleted Argument: DuBois and the Illusion of Race*, in "RACE," WRITING, AND DIFFERENCE 21 (Henry L. Gates ed., 1985).

16. Without using the words "slave" or "slavery," the Constitution provided that: (1) slaves would be counted as three-fifths of a person for purposes of the taxation and representation of those citizens who owned them; (2) the slave trade could not be banned before 1808; (3) fugitive slaves had to be returned to their "owners;" and (4) Congress could call forth the militia to suppress slave rebellions. See U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole number of free Persons . . . three fifths of all other persons."); U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . ."); U.S. CONST. art. IV, § 3 ("No Person held to Service or Labour in one State, under the laws thereof, escaping into another . . . shall be delivered up on claim of the Party to whom such Service or Labour may be due."); U.S. CONST. art. I, § 8, cl. 15 ("Congress shall have power to provide for calling forth the Militia to . . . suppress Insurrections and repel Invasions."). See generally THE CONSTITUTION; A PRO-SLAVERY COMPACT: OR, EXTRACTS FROM THE MADISON PAPERS, ETC. (Wendell Phillips ed., 1856) (debating clauses of Constitution relating to slavery) [hereinafter A PRO-SLAVERY COMPACT]; Staughton Lynd, *Slavery and the Founding Fathers*, in BLACK HISTORY: A REAPPRAISAL (Melvin Drimmer ed., 1968) (collecting essays); Paul Finkelman, *A Covenant with Death: Slavery and the Constitution*, AM. VISIONS, May/June 1986, at 21.

17. For a discussion of the influence of slaveholding interests on shaping international law, see *infra* notes 149-90 and accompanying text.

trated by the story of the Black Seminoles<sup>18</sup> in Spanish Florida and the tireless efforts of southern planters and the federal government to enslave them, both through the law and despite it. Analyzing this story, we see that our laws were carefully constructed to protect the profitability of private property; that the power of the state was consistently used to protect and further those interests; and that the protection of slavery was not incidental but essential to the establishment of this government and its system of laws. A critical analysis allows us to see ways in which very similar forces are at work today, using the same government, with the same legal framework, to protect similar interests.<sup>19</sup> The patterns we see in the story of the Black Seminoles can be seen in “mainstream” international law and policy today, such as the intellectual property rights regime the United States is developing and promoting worldwide.

These days the idea that a whole human being could be owned as “property” is denounced as barbaric—a gross violation of international law, not just law that has been developed through agreement, but *jus cogens*, a preemptory norm of international law.<sup>20</sup> Yet we are moving to-

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18. There is much disagreement about the best way to refer to the peoples of African descent who helped form and/or later joined the Seminole nation. See generally Herb Frazier, *Gullah People Shared Battles, History with Seminole Indians*, ASSOC. PRESS, Aug. 18, 1999, available in Westlaw, ASSOCPR Database (noting that fact that Florida Seminoles of African descent do not refer to themselves as “Black Seminoles” reflects current estrangement between Seminole Tribe of Florida and Seminole Nation of Oklahoma). Nonetheless, for the times and groups that I am most concerned with in this Essay, I believe the term “Black Seminole” is often the most widely used and appropriate designation.

19. Although the content of what can be considered “property” has changed over the years, this is due to the imposition of moral constraints on the law more than changes in the structure of the law itself. Thus, the sale of organs or babies for adoption is consistent with property law; such transactions are only illegal because we impose certain values on the system. See generally Shelby E. Robinson, *Organs for Sale? An Analysis of Proposed Systems for Compensating Organ Providers*, 70 U. COLO. L. REV. 1019 (1999) (arguing systems of compensation for donors should be considered to relieve shortage of organs available for transplant); Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society’s Most Vulnerable Participants in a Commercial Organ Transplantation System*, 21 AM. J.L. & MED. 45 (1995) (discussing ethical considerations that need to be addressed if a commercial organ transplant system is legalized).

Much debate has been spurred by one article, Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978), which considered how changes in adoption laws might make the existing market in babies more efficient and equitable. See, e.g., Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987) (addressing objections to the concept of regulating adoption market); Margaret Jane Radin, *What, If Anything, Is Wrong with Baby Selling?*, 26 PAC. L.J. 135 (1995) (outlining arguments against creating a market in babies); Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913 (1994) (expressing concern over allowing market determinations of “value” of children).

20. The Vienna Convention on the Law of Treaties defines *jus cogens* as a “norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same char-

ward a legal regime that makes people's words and ideas, their body parts, their cells and their DNA, as well as plants and seeds and organic matter, "property."<sup>21</sup> It is property that can be alienated and whose value can be concentrated in the hands of large corporations which are, in turn, treated as "persons" by the legal system; property whose value is calculated in terms of its profitability rather than what it contributes to the well-being of society.

The recent controversy over South Africa's attempt to use compulsory licensing and parallel importation to bring affordable AIDS drugs to its people<sup>22</sup> illustrates the extent to which the United States will protect property in the form of patents, trademarks and copyrights under our laws and insist that other countries implement similar laws, regardless of the human costs. We justify this protection of "intellectual property" with many of the same legal, economic and social arguments that were used two hundred years ago to justify holding people of African descent as property. This is one reason why it is important to bring critical race theory to bear on questions of international law, because the United States' attitude toward, interpretation of, and influence on international law is interwoven with our particular history of "race" and racial subordination.

The story of the Black Seminoles, documented in 1858 by Joshua Giddings, Congressman from Ohio, in his book, *The Exiles of Florida: Or, The Crimes Committed By Our Government Against the Maroons*,<sup>23</sup> *Who Fled from*

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acter." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 53, T.S. No. 58, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980); see NEWMAN & WEISSBRODT, *INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS* 602 (1996) (stating examples of *jus cogens* include: "genocide, slave-trading and slavery, apartheid and other gross violations of human rights . . . ." (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, reporter's note 6 (1987); see also Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 7 U.S.T. 479, 60 L.N.T.S. 253 (entered into force Dec. 7, 1953 (entered into force in U.S. Mar. 7, 1956)); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Sept. 5, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3 (entered into force Apr. 30, 1957 (entered into force in U.S. Dec. 6, 1967)); A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303 (1999).

21. For a discussion of these new forms of property and changes in the international intellectual property regime, see *infra* notes 235-43, 256-82 and accompanying text.

22. For a discussion of South Africa's attempts to provide affordable AIDS drugs to its people, see *infra* notes 287-314 and accompanying text.

23. The English term "maroon" and the French "*marron*" are said to be derived from the Spanish term "*cimarron*," which was used to refer to domestic cattle that had taken to the hills in Hispaniola, then to Indian slaves who escaped from the Spanish. See Robert J. Cottrel, *Outlawing Outcasts: Comparative Perspectives on the Differing Functions of the Criminal Law of Slavery in the Americas*, 18 CARDOZO L. REV. 717, 739 n.108 (1996) (noting history of Cimarrones and Maroons and their ancestors' escape from Spanish). By the 1530s it was used primarily to refer to African slaves who escaped and created independent communities throughout the Americas. See Herbert Aptheker, *Maroons Within the Present Limits of the United States*, in MAROON SOCIETIES: REBEL SLAVE COMMUNITIES IN THE AMERICAS 1 n.1 (Richard

*South Carolina and Other Slave States, Seeking Protection Under Spanish Law*,<sup>24</sup> is presented in Part II of this Essay.

Part III analyzes this history as one of the earliest examples of the intertwining of race and international law in our history—a lens through which we can see how the U.S. legal system and the might of the federal government were used to define people as property and protect the profitability of that property through international law and foreign policy. Part IV considers how this history continues to influence the law and the lives of Black Seminoles by looking at *Davis v. United States*,<sup>25</sup> a contemporary case challenging a U.S. government policy of paying reparations for lands taken from the Seminoles in Florida in the 1830s, but excluding the descendants of Black Seminoles from this settlement, implying that their ancestors were “property” rather than “property owners” at the time of the taking.<sup>26</sup>

Part V presents the idea that the story of slavery and the Seminoles parallels, in many respects, the ways in which our government currently employs law, as well as political and economic power, to create intellectual property rights and enforce them internationally. The controversy over AIDS drugs in South Africa is used to illustrate the human consequences of the regime of intellectual property rights the United States is promoting. Part VI concludes that incorporating critical race theory into our

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Price ed., 1979) (explaining that between 1672 and 1864, at least 50 such maroon communities are known to have existed in United States, from Virginia to Louisiana and Florida); William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1768-70 (1996) (examining origins of slavery on mainland colonies and noting South Carolina's treatment of Maroons during Colonial period).

24. GIDDINGS, *supra* note 1; see Speech Upon the Bill Appropriating One Hundred Thousand Dollars for the Removal of Certain Seminole Chiefs and Warriors West of the Mississippi (Feb. 8, 1841), in SPEECHES IN CONGRESS 1 (Joshua R. Giddings ed., 1968) (1853) (noting comments by Giddings about Florida Wars). This history has been more recently documented by a number of other authors. See generally IRA BERLIN, MANY THOUSAND GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA (1998); HENRIETTA BUCKMASTER, THE SEMINOLE WARS (1966); WILLIAM LOREN KATZ, BLACK INDIANS: A HIDDEN HERITAGE (1986); EDWIN C. MC-REYNOLDS, THE SEMINOLES (1957); JOHN C. MAHON, HISTORY OF THE SECOND SEMINOLE WAR, 1835-1842 (1967); KEVIN MULROY, FREEDOM ON THE BORDER: THE SEMINOLE MAROONS IN FLORIDA, THE INDIAN TERRITORY, COAHUILA, AND TEXAS (1993); KENNETH W. PORTER, THE BLACK SEMINOLES: HISTORY OF A FREEDOM-SEEKING PEOPLE (Alcione M. Amos & Thomas P. Senter ed. & rev., 1996); BRUCE EDWARD TWYMAN, THE BLACK SEMINOLE LEGACY AND NORTH AMERICAN POLITICS, 1693-1845 (1999); Aptheker, *supra* note 23; George Klos, *Blacks and the Seminole Removal Debate, 1821-1835*, in THE AFRICAN AMERICAN HERITAGE OF FLORIDA 128 (Colburn & Landers eds., 1995); Jane L. Landers, *Traditions of African American Freedom and Community in Spanish Colonial Florida*, in THE AFRICAN AMERICAN HERITAGE OF FLORIDA, *supra*, at 17.

25. *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999). For a further discussion of *Davis*, see *infra* notes 191-218 and accompanying text.

26. See *Black Seminoles File Racial Discrimination Suit Against Federal Government and Bureau of Indian Affairs*, NAT'L B. ASS'N MAG., Jan.-Feb. 1996, at 24 (describing lawsuit in *Davis*) [hereinafter *Black Seminoles File*].



analyses helps us understand the influence that the construction of race and institutionalization of racism have on the United States' complex relationship to international law.

## II. SLAVERY AND SEMINOLES: PEOPLE AS PROPERTY

### A. *Setting the Stage: Maroons Before 1776*

Georgians often note with pride that slavery was prohibited in the initial charter of the colony.<sup>27</sup> However, a primary reason for this was that Georgia was initially conceived as a buffer, a demilitarized zone in the battle to prevent slaves in South Carolina from escaping to Spanish-owned Florida. According to Giddings, "[T]he constant escape of slaves and the difficulties resulting therefrom, constituted the principal object for establishing a free colony between South Carolina and Florida."<sup>28</sup> As early as 1687, runaway slaves—referred to as "maroons"<sup>29</sup>—from South Carolina made their way to the Spanish city of St. Augustine where they were given asylum.<sup>30</sup> In 1693, the King of Spain issued an order freeing the fugitive slaves, and in 1704 the governor of Florida announced that "[a]ny *negro* of Carolina, Christian or not, free or slave, who wishes to come fugitive, will be [given] complete liberty."<sup>31</sup> Word of freedom in Florida traveled rapidly through slave communities within the British colonies. Giddings says of the maroons:

Their numbers had become so great in 1736, that they were formed into companies, and relied on by the Floridians as allies to aid in the defense of that territory. They were also permitted to occupy lands upon the same terms that were granted to the citizens of Spain; indeed, they in all respects became free subjects of the Spanish crown.<sup>32</sup>

In 1738, the colonial government of South Carolina demanded that the Spanish governor of St. Augustine return the fugitive slaves, and the governor refused. This was the first encounter in what would become a long and bloody international fiasco.<sup>33</sup> In 1739, with war against the British

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27. See JAMES C. COBB, *GEORGIA ODYSSEY* 3 (1997) ("[L]awyers were banned as were slavery, Catholicism, and hard liquor.").

28. GIDDINGS, *supra* note 1, at 2. In 1739, there was a slave uprising in South Carolina, called the Stono Rebellion, which involved hundreds of slaves trying to escape to Florida. See generally Y. N. Kly, *The Gullah War, 1739-1858*, in *THE LEGACY OF IBO LANDING: GULLAH ROOTS OF AFRICAN AMERICAN CULTURE* 1 (Marquetta L. Goodwine ed., 1998).

29. For a discussion of maroons, see *supra* note 23 and accompanying text.

30. See MULROY, *supra* note 24, at 8.

31. *Id.*

32. GIDDINGS, *supra* note 1, at 2.

33. See *id.* (describing encounter). Referring to people of African descent in South Carolina, Georgia and Florida as "Gullah," Y. N. Kly argues that the period from 1739 to 1858, from the Stono Rebellion to the end of the Third Seminole War, should be recognized as "an important but seldom discussed war against slav-

imminent, the Spanish governor created what may have been the first free Black community in North America by setting aside a fort near St. Augustine, Gracia Real de Santa Teresa de Mose, for the maroons.<sup>34</sup>

European settlers considered slavery essential to the economic development of the south. A delegate to the South Carolina Constitutional Convention argued that "[w]ithout negroes, this State would degenerate into one of the most contemptible in the Union."<sup>35</sup> He quoted the declaration of General Pinkney, another "founding father," that "whilst there remained one acre of swamp land in South Carolina, he should raise his voice against restricting the importation of negroes."<sup>36</sup> A prominent Georgian argued that:

The poor People of Georgia, may as well think of becoming Negroes themselves (from whose Condition at present they seem not to be far removed) as of hoping to be ever able to live without them; and they ought best to know, and most to be believed, who have made the Experiment.<sup>37</sup>

By 1750 the pro-slavery forces had prevailed, and Georgia entered the Union with slaves comprising nearly one-half of its population.<sup>38</sup>

Initially, there had been attempts to enslave Indians as well as Africans, but the Indians, being familiar with the land, were often able to escape.<sup>39</sup> In the mid-1700s, there was a split within the Creek nation and a large group of Indians left Georgia and Alabama, moving south to Florida

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ery and colonization, the "Gullah War" which posed "a substantial threat to the successful maintenance and operation of the enslavement system, a threat . . . evident in the implacability with which, on the U.S. colonist and later federal side, it was pursued." Kly, *supra* note 28, at 19; see Frazier, *supra* note 18 ("In the ornate chamber of the Oklahoma Senate . . . 200 black Oklahomans were told of their historic link with Gullah people in South Carolina and Georgia.").

34. See MULROY, *supra* note 24, at 9 (noting efforts to help maroons); see also Landers, *supra* note 24, at 23 ("While conditions were harsh . . . the black homesteaders were at least free to farm their own lands, build their own homes and live in them with their families—in short, free to begin the process of community formation.").

35. A PRO-SLAVERY COMPACT, *supra* note 16, at 99.

36. *Id.*

37. COBB, *supra* note 27, at 5 (quoting Thomas Stephens, whose father was secretary to the trustees of the colony).

38. See *id.* (noting that by 1760 more than one-third of Georgia's population were slaves).

39. Based on information compiled by the Indian Claims Commission, the Court of Claims noted in 1967 that attempts to enslave Indians accounted for a significant decline in the Indian population in Florida in the 1600s:

The plantation economy of the Carolina colony demanded an abundant labor supply, a factor which in turn gave rise to numerous "slave" raids . . . . The Indians of Florida bore the brunt of these attacks. So extensive were the slaving expeditions that, by the early 1700s, the once viable Spanish mission system, together with its clustered aboriginal population, was virtually eliminated.

United States v. Seminole Indians, 180 Ct. Cl. 375, 379 (1967).

and declaring themselves independent of Creek authority.<sup>40</sup> In Florida they united with Miccosukee Indians and maroons, and came to be known as Seminoles, a Creek word meaning "runaway."<sup>41</sup> The United States Court of Appeals for the Tenth Circuit recently summarized this history:

The Seminole Nation is an Indian tribe formed after the European conquest of America and composed of both Native American and African peoples. Some members of the Seminole Nation are descended from escaped African slaves who resided among several Native American groups living in what is now Florida. These Native American groups, together with the Africans living among them, became known as the Seminoles.<sup>42</sup>

The Seminole confederation was "a loose organization of associated towns enjoying a great deal of local autonomy and displaying a large measure of cultural diversity."<sup>43</sup> The relationship between the Seminoles of African and Indian descent was complicated and is still a subject of controversy.<sup>44</sup> Giddings reports that the Creeks who moved south into Florida "settled in the vicinity of the Exiles, associated with them, and a mutual sympathy and respect existing, some of their people intermarried, thereby strengthening the ties of friendship."<sup>45</sup>

Some of the members of the Seminole nation who were of African descent had never been enslaved, some had escaped from slavery, and others were the descendants of fugitive slaves.<sup>46</sup> Adding to this mix, dur-

40. The Creek Confederacy had been formed in the late 17th century through alliance with or conquest of various Indian nations of Georgia and Alabama. These nations, decimated by disease following the initial Spanish invasions, formed a union to counter the strength of the Cherokee nation and the European invaders. See McREYNOLDS, *supra* note 24, at 12-13 (noting diversity in composition of Creeks).

41. According to Giddings, the term "Seminole" was first used to refer to the maroons and later to the Indians with whom they aligned themselves. See GIDDINGS, *supra* note 1, at 3-4; McREYNOLDS, *supra* note 24, at 12 (quoting letter from Indian Agent Wiley Thompson to Judge Augustus Steele, dated Mar. 31, 1835); see also *Seminole Nation v. United States*, 78 Ct. Cl. 455, 458 (1933) (1933 WL 1802) (noting that "Seminole" was "a name indicating 'wild wanderers or runaways'").

42. *Davis v. United States*, 192 F.3d 951, 954 (10th Cir. 1999) ("The Africans were referred to in the Seminole tongue as 'Estelusti.'").

43. MULROY, *supra* note 24, at 7.

44. For a further discussion of the controversy, see *infra* notes 191-215 and accompanying text.

45. GIDDINGS, *supra* note 1, at 3-4. Although he does note numerous cases in which maroons were adopted into Seminole clans, Mulroy emphasizes that the African and the Indians were close allies who "preferred to remain separate, settling apart and maintaining their own economic and social arrangements." MULROY, *supra* note 24, at 21.

46. See GIDDINGS, *supra* note 1, at 3-5; see also *Seminole Nation*, 78 Ct. Cl. at 458-59 (noting that in addition to owning slaves, the Seminoles "unquestionably harbored fugitive slaves escaping from their masters in Southern States and Cuba" and that "intermarriage frequently occurred, and the Negroes were . . . recognized allies of the Indians").

ing the British occupation of Florida, some Seminole chiefs acquired slaves, either by “purchasing” them or as “gifts” from the British.<sup>47</sup> This relationship, however, bore only passing resemblance to the chattel slavery of the southern states. Kenneth Porter who, in the 1940s, did extensive research on the Seminoles says:

The Seminoles were somewhat perplexed about how to use their new property best. They apparently had no intention of devoting their lives to managing slaves. Soon, however, they solved their dilemma by supplying the blacks with tools to cut down trees, build houses for themselves, and raise corn. When the crop was harvested, their masters received a reasonable proportion of it as a kind of tribute. One observer reported that no more than ten bushels of corn were ever demanded . . . .

Indian patrons probably asserted ownership of their slaves if they were claimed by a former master or any other white man. But whites generally did not understand this unusual arrangement . . . .

The blacks lived apart from the Seminoles in their own villages, prized evidence of their independence . . . except for the annual tribute, the blacks were no more subordinate to the chiefs than the Seminoles themselves.

Soon the distinction between purchased slaves and run-aways—if it ever existed—blurred and essentially vanished.<sup>48</sup>

#### B. *Slavery and International Law in the New Nation*

Georgia's first communication to the Continental Congress was to request a large force of Continental troops to prevent slaves from escaping to join the maroon or “exile” communities in Florida, but not much was done by the central government until the end of the war for independence.<sup>49</sup> In 1783 the Treaty of Paris recognized the United States as a nation and returned eastern Florida, which had been occupied by the British since 1763, to Spanish control.<sup>50</sup> The British had used slave labor extensively in Florida,<sup>51</sup> but when the war of independence broke out,

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47. See PORTER, *supra* note 24, at 5.

48. *Id.* at 5-6; see Klos, *supra* note 24, at 130 (“[T]he Seminole slave system was akin to tenant farming.”).

49. See GIDDINGS, *supra* note 1, at 4 (noting Council of Safety for Georgia sent Congress communication requesting Continental troops to prevent slaves from deserting masters; however, Congress refrained from action until after 1783).

50. See McREYNOLDS, *supra* note 24, at 22.

51. According to Landers, the British established indigo, rice, sugar, cotton plantations and imported slaves and “[s]oon blacks were the most numerous element of Florida's population.” Landers, *supra* note 24, at 25.

"fugitive blacks from Georgia and South Carolina found Florida a safe haven once again."<sup>52</sup>

Between 1783 and 1788, the State of Georgia claimed to enter into three treaties in which the Creek Indians ceded land to Georgia and promised to return slaves living among them.<sup>53</sup> There were objections, of course, within the newly formed federal government to this assertion of state power in international affairs. When conflict with the Creeks ensued, the federal government, acting under the Articles of Confederation, commissioned its agents to negotiate a treaty with the Creeks which would, in the process of asserting federal control over treaty negotiations, "restore all fugitive slaves belonging to citizens of the United States."<sup>54</sup> In 1790, George Washington completed negotiation of the United States' first treaty under the new Constitution, "the title-page of our diplomatic history."<sup>55</sup> Known as the Treaty of New York, it purported to be an agreement between all the citizens of the United States and "all the individuals, towns and tribes of the Upper, Middle and Lower Creeks and Semanories [sic] composing the Creek nation of Indians."<sup>56</sup> It created a new boundary between certain Creek lands and Georgia, and stipulated that the Creek nation would deliver to representatives of the United States,

all citizens of the United States, white inhabitants or negroes, who are now prisoners in any part of the said nation. And if any such prisoners or negroes should not be so delivered . . . the governor of Georgia may empower three persons to repair to the said nation, in order to claim and receive such prisoners and negroes.<sup>57</sup>

This set the stage for increasingly bloody conflict over: (1) just who, exactly, the Creeks had agreed to return; and (2) the ability of the Creeks to

52. PORTER, *supra* note 24, at 5.

53. See GIDDINGS, *supra* note 1, at 5-8 (reporting that these treaties were said to have been entered into at Augusta in 1783, at Galphinton in 1785, and at Shoulderbone in 1788); PRUCHA, *supra* note 2, at 59-65 (setting date of Shoulderbone at 1786).

54. GIDDINGS, *supra* note 1, at 8 (referencing October 26, 1787 resolution of Continental Congress).

55. *Id.* at 12.

56. Treaty of New York, *supra* note 2; see PRUCHA, *supra* note 2, at 449 (reproducing treaty on page following page 144).

57. GIDDINGS, *supra* note 1, at 12-13. Giddings notes that in a "secret article" the United States also agreed to pay the Creeks \$1500 a year for all time. He says: The reason for making this stipulation secret . . . cannot now be accounted for, except from the delicacy which the authorities of our nation then felt in taxing the people of the free States, to pay southern Indians for the return of those Exiles. . . . [F]or nearly seventy years the people of the nation have contributed their funds to sustain the authority of those slaveholders of Georgia over their bondmen, while Northern statesmen have constantly assured their constituents, they have nothing to do with that institution.

*Id.* at 13-14; see PRUCHA, *supra* note 2, at 81-83 (describing Treaty of New York).

speak for the Seminoles. The Seminoles repudiated the treaty on the grounds that they were not Creeks, they had not been represented in the negotiations and they lived in Spanish Florida.<sup>58</sup>

Despite pressure from the United States to capture and deliver all fugitive slaves, the Spanish gave those of African descent the same rights as any others in Florida and refused to surrender Spanish subjects to slaveholders.<sup>59</sup> This was the cause of considerable agitation within the United States. In 1793, George Washington delivered a message to Congress concerning "the unsettled matters with Spain."<sup>60</sup> After referring to negotiations over boundaries, navigation and commerce, he said, "In the mean time, some other points of discussion had arisen with [Spain], to wit, *the restitution of property escaping into the territories of each other*, the mutual exchange of fugitives from justice, and above all, the mutual interferences with the Indians lying between us."<sup>61</sup>

U.S. slaveholders continued to pressure the federal government to protect and enhance the profitability of slavery. They were frustrated by an unsuccessful campaign for reparations from the British for slaves freed and taken from the colonies during the Revolutionary War,<sup>62</sup> but managed in 1802, under the administration of Thomas Jefferson, to get what Giddings described as "a new law regulating intercourse with the Indian tribes . . . by which the holders of slaves were secured for the price or value of any bondmen who should leave his master and take up his residence

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58. GIDDINGS, *supra* note 1, at 16. Despite these problems, these provisions of the Treaty of New York were reaffirmed by the Treaty of Coleraine, signed June 29, 1796. See PRUCHA, *supra* note 2, at 98 (setting forth provisions of Treaty of Coleraine).

59. See GIDDINGS, *supra* note 1, at 17.

60. Message from the President of the United States Relative to the Unsettled Matters with Spain, Dec. 16, 1793, 3d Cong., 1st Sess., No. 66, in DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES 247 (Lowrie & Clarke eds., 1833). There was also an attempt on Aug. 2, 1791, by James Seagrove to get the Florida governor to agree to stop and return all fugitive slaves escaping into Florida. See *id.* at 248.

61. *Id.* (emphasis added). Some of the problems associated with treating people as property for purposes of law are illustrated by the wording—"property escaping into the territories." See *United States v. Amy*, 24 F. Cas. 792, 809-10 (C.C.D. Va. 1859) (No. 14,445) (Circuit Judge Taney holding that even though slave is property "recognized and secured by the Constitution and laws of the United States," slave is also person for purposes of criminal law enforcement); Ariel Gross, *Pandora's Box: Slave Character on Trial in the Antebellum Deep South*, 7 YALE J.L. & HUMAN. 267 (1995) (noting "double character" of slaves as "persons when accused of a crime, and property the rest of the time").

62. See GIDDINGS, *supra* note 1, at 19-24 (describing U.S. slaveholders' attempt to obtain reparations from British for slaves freed and taken from colonies during war, and hope of some debtors that these reparations would indemnify them for lost slaves).

with any Indian tribe resident in the United States, or Territories thereof . . . ."<sup>63</sup>

In other words, the federal treasury would indemnify slaveholders for slaves who escaped to live with the Indians, but only if they were within U.S. territory. One effect of this law was, of course, to heighten the incentive to take possession of Florida. That incentive increased in 1808, when the slave trade (not the institution of slavery, but the importation of slaves) was officially banned.<sup>64</sup> This rendered slave-catching expeditions in Florida—which had clearly violated Spanish sovereignty and thus international law—illegal under U.S. law as well. If Florida were part of the United States, it would be much easier to enslave Black Seminoles without appearing to engage in the slave trade. Giddings says:

The people of Georgia . . . were greatly excited at seeing those who had once been slaves . . . now live quietly and happily in the enjoyment of liberty, with their flocks and their herds, their wives and their little ones, around them; but they were on Spanish soil, protected by Spanish laws. The only mode of enslaving them was, firstly, to obtain jurisdiction of the Territory . . . .<sup>65</sup>

In 1811, in secret session, Congress agreed to the taking of Florida.<sup>66</sup> With President Madison's approval—which he denied when Spain protested—troops from Georgia invaded Florida in 1811, 1812 and 1813, in violation of a treaty of friendship with Spain.<sup>67</sup> In 1811, former Georgia Governor George Mathews was sent to annex east Florida. He organized a group of volunteers known as the "Patriots" who, backed by federal gun-

63. *Id.* at 26; see Intercourse Act of Mar. 30, 1802, ch. 13, § 19, 2 Stat. 145 (regulating intercourse between Indian nations), *amended by* Act of June 30, 1834, ch. 161, 4 Stat. 729.

64. See Act of Mar. 2, 1807, 2 Stat. 426 (creating "Act to prohibit the importation of Slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight"); see also W.E.B. DU BOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638-1870* 94-108 (1970) (orig. pub'd in 1896) (discussing desire to obtain slaves from Florida once slave trade was outlawed).

65. GIDDINGS, *supra* note 1, at 29.

66. According to Kenneth Porter, "on January 15, 1811 Congress secretly authorized President Madison to seize all or any part of Florida if the 'local authorities' agreed or a foreign government tried to occupy any portion of the region." PORTER, *supra* note 24, at 3; see also David P. Currie, *Rumors of War: Presidential and Congressional War Powers, 1809-1829*, 67 U. CHI. L. REV. 1, 7 (2000) (noting that Congress authorized President to occupy East Florida in face of foreign threat or at behest of local authorities, but ordered authorization to be kept confidential until end of following session).

67. See Treaty of Friendship, Limits and Navigation, Oct. 27, 1795, U.S.-Spain, 53 Consol. T.S. 9. Speaking of the invasions of 1811, Giddings says, "These things occurred while our nation was professedly at peace with Spain, and constituted a most flagrant violation of our national faith." GIDDINGS, *supra* note 1, at 30.

boats, occupied Amelia Island and then laid siege to St. Augustine.<sup>68</sup> Deciding that Mathews had acted too openly, and fearful of provoking hostilities with Spain while war with England was imminent, President Madison dismissed him.<sup>69</sup> This was, however, “largely a subterfuge,” and Georgia Governor David Mitchell was assigned to the operation.<sup>70</sup> Mitchell immediately mobilized the Georgia militia, hoping the Seminoles would fight for the Spanish and thus “afford a desirable pretext for the Georgians to penetrate their country, and Break up a Negroe Town: an important Evil growing under their patronage.”<sup>71</sup> The Spanish reinforced St. Augustine with four hundred European and five hundred black troops; while over two hundred Seminole warriors from nearby villages prepared to fight the U.S. troops.<sup>72</sup> Taking advantage of the confusion, runaway slaves joined both the Seminoles and the Spanish forces.<sup>73</sup>

By September 1812, the Georgia militia was forced to withdraw, giving the Seminoles a few months respite.<sup>74</sup> According to Giddings, as the militia retreated, “they robbed those Spanish inhabitants who fell in their way of all their provisions, and left them to suffer for the want of food. Nor were the Georgians satisfied with taking such provisions as were necessary to support life; they also took with them a large number of slaves . . . .”<sup>75</sup> Thus, in addition to violating Spanish sovereignty, the Georgia militia was actually engaging in the slave trade, but Giddings says, “so greatly was the attention of the people of the Northern States absorbed in [the war with Britain and the Indian wars in the Northwest] that they were scarcely conscious of the slave-catching forays carried on by the State of Georgia.”<sup>76</sup>

Shortly thereafter, federal troops were again called into action in response to pleas about the imminent danger of slave rebellions. In 1813, John McIntosh complained to Secretary of State James Monroe that “the whole province [of Florida] will be the refuge of fugitive slaves; and [will] . . . bring about a revolt of the black population in the United States.”<sup>77</sup> A third invasion of Spanish Florida was organized under the command of Major General Thomas Pinckney. Promising that “every negro found in arms

68. See GIDDINGS, *supra* note 1, at 29-30 (noting Mathews’ forced taking of Amelia Island).

69. See GIDDINGS, *supra* note 1, at 30 (same); PORTER, *supra* note 24, at 3-4, 7 (describing Mathews’ first step in annexing Florida and his subsequent dismissal by Madison).

70. See GIDDINGS, *supra* note 1, at 30 (“Mitchell . . . in fact, continued to carry forward the policy which Mathews had inaugurated.”); PORTER, *supra* note 24, at 7 (discussing how Mitchell continued military action in Florida).

71. PORTER, *supra* note 24, at 8.

72. See *id.* (describing events of 1811 invasion of Florida by Georgia militia).

73. See *id.*

74. See *id.* at 10-11.

75. GIDDINGS, *supra* note 1, at 30. The latter were probably not enslaved in Florida, but were kept or sold as slaves by the Georgia militia.

76. *Id.* at 32.

77. PORTER, *supra* note 24, at 11 (emphasis added).



[would] be put to death without mercy,"<sup>78</sup> American troops leveled two of the principal Seminole villages, destroyed their crops, and stole their livestock and other property before the Seminole resistance forced them to withdraw.<sup>79</sup>

### C. *The Seminole Wars: Liberty or Death*

After the War of 1812, the British abandoned a fort they held on the Apalachicola River in Florida, sixty miles from the U.S. border, and gave it to the surrounding community of maroons. The very existence of this fort so troubled U.S. leaders that in May 1816, General Andrew Jackson wrote the commanding general of the southern frontier:

I have little doubt of the fact, that this fort has been established by some villains for the purpose of rapine and plunder, and that it ought to be blown up, *regardless of the ground on which it stands*; and if your mind shall have formed the same conclusion, destroy it and return the *stolen negroes* and property to their rightful owners.<sup>80</sup>

Shortly thereafter, without provocation, U.S. troops entered Florida and attacked and burned the fort, killing 270 and wounding all but three of the 334 Seminoles, mostly women and children, who were inside. They also captured, gruesomely tortured and killed two warriors, one Indian and one Black, whom they designated the "chiefs."<sup>81</sup> Those who survived were taken back to Georgia and

delivered over to men who claimed to have descended from planters who, some three or four generations previously, owned the ancestors of the prisoners. There could be no proof of identity, nor was there any court authorized to take testimony or enter decree in such case. Nevertheless, they were delivered over upon *claim*, taken to the interior and sold to different planters.<sup>82</sup>

The governor of Florida, "in the name of 'his Most Christian Majesty the king of Spain,'"<sup>83</sup> protested the action and demanded return of the property—acknowledged by the Americans to be worth at least two thousand dollars—taken from the fort. The commander of the U.S. gunboats responded that the property belonged not to the Spanish crown, but to

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78. *Id.* (quoting from Brigadier General Flournoy).

79. See GIDDINGS, *supra* note 1, at 31 (noting invasion caused extensive physical damage, but troops were unable to capture any Exiles and return them as slaves); PORTER, *supra* note 24, at 12 (describing destruction laid on Seminoles by American troops).

80. GIDDINGS, *supra* note 1, at 37 (first emphasis added).

81. See *id.* at 41-42 (describing treatment of two captured warriors).

82. *Id.* at 42 (discussing fate of Seminoles who survived attack on fort on Apalachicola River).

83. *Id.* at 43.

the Black Seminoles, from whom it had been taken by conquest.<sup>84</sup> Giddings notes, “[p]erhaps no portion of our national history exhibits such disregard of international law, as this unprovoked invasion of Florida,”<sup>85</sup> and asks what international law or constitutional power allowed officers of the Executive of the United States to “dictate to the crown of Spain in what part of his territory he should, or should not, erect fortresses” or to “invad[e] the territory of a nation at peace with the United States, destroy a fort, and consign its occupants to slavery.”<sup>86</sup>

Shortly thereafter, the Seminoles launched a retaliatory attack on a U.S. vessel on the Apalachicola River, an incident that was used—without mention of the burning of the fort—to get Congress to allocate money for what became the First Seminole War.<sup>87</sup> As historian Kevin Mulroy says, “The so-called First Seminole War broke out when Africans and Indians allied in opposition to the slave-hunting expeditions of white southerners.”<sup>88</sup> After several bloody but unsuccessful campaigns against the Seminoles, pressure mounted for the federal government to purchase Florida.<sup>89</sup>

In 1819, Spain, drained by the Napoleonic Wars and unable to effectively counter rising U.S. military power, agreed to sell Florida to the

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84. *See id.* (stating response of U.S. gunboats commander).

85. *Id.* at 37 n.1.

86. *Id.* at 38. David Currie quotes Virginia representative Edward Colston's condemnation of Andrew Jackson's actions in East Florida:

The power of declaring war had, for the wisest reasons, been confided, by the framers of the Constitution, to Congress; and yet we have seen the province of a nation, with whom we were at peace, invaded; her fortresses besieged and stormed; her towns taken; the blood of her citizens shed; her Government subverted; her laws abrogated; the civil power usurped, and those soldiers who had been placed there to preserve her authority and enforce her laws, sent off from the province they were intended to defend, and all this without any act of Congress to warrant it.

Currie, *supra* note 66, at 14. One is reminded of the 1989 U.S. invasion of Panama. For a further discussion of the U.S. invasion of Panama, see *infra* note 279 and accompanying text.

87. *See* GIDDINGS, *supra* note 1, at 47-49 (describing attack that led to First Seminole War).

88. MULROY, *supra* note 24, at 16. Kly quotes from an interview conducted by Jan Carew with an aged descendant of the maroons, talking about the 1818 Battle of Suwanee:

I heard 'bout the battle of Swanee against Stonewall Jackson, my grandmother tell me 'bout it and her grandmother tell her 'bout it long before. Stories like that does come down to us with voices in the wind. She tell me how the Old Ones used to talk 'bout the look on them white soldiers' faces when they see Black fighters looking like they grow outta the swamp grass and the hammocks, coming at them with gun and cutlass . . .

Kly, *supra* note 28, at 34.

89. *See* GIDDINGS, *supra* note 1, at 58-59 (“Southern statesmen now turned their attention to the purchase of Florida. That would deprive the Indians and Exiles of the nominal protection of Spanish laws, and would bring them under the jurisdiction of the United States; they therefore addressed themselves to that policy with renewed assiduity.”).

United States for five million dollars.<sup>90</sup> Thus, from the U.S. perspective, “[a]fter 1821, the problems between whites, Seminoles, and black allies of the Seminoles changed from an international issue to an internal one; the Florida Indians could now be dealt with unilaterally by the United States.”<sup>91</sup> This set the stage for thirty years of warfare over the “removal” of the Seminoles to Creek lands in the west.

The conflict over removal can only be understood in the context of several treaties, beginning with the 1821 Treaty of Indian Springs.<sup>92</sup> Claiming that the Creeks had not returned “property” as required under the 1790 and 1796 treaties,<sup>93</sup> Georgians had pressured the federal government into negotiating a new treaty with the Creeks which would indemnify them for slaves lost between the war of independence and the Compensation Act of 1802.<sup>94</sup> During the negotiations, the Creek representatives noted that they had delivered up all prisoners and “such negroes as were then in the nation,”<sup>95</sup> but that some had been carried away by the British during the War of 1812, others were killed by U.S. troops in the fort at Apalachicola, and still others were living with the Seminoles, not the Creeks. According to Giddings, the Georgia commissioners replied that the Creeks were bound to deliver:

all negroes who had left their masters in Georgia; that if they had done so, the British would not have carried them off, nor would they have been killed in the fort; that the *Seminole*s were a part of the Creek nation, who were responsible, not only for the slaves and their increase, but also for the loss of labor which they would have performed had they remained in bondage.<sup>96</sup>

In the end, the Treaty of Indian Springs provided that the Creeks would cede five million acres of land and receive \$200,000 in cash over fourteen years. An additional \$250,000 that the Creeks were to receive was set aside to pay claims of slaveholders for “property” purportedly lost to the Creeks between 1775 and 1802.<sup>97</sup> In exchange for this indemnifica-

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90. See *id.* at 59 (noting sale of Florida to United States in 1819). According to C.J. Marshall, the United States obtained approximately thirty million acres of land, of which about three million had been granted to individuals. See *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) (construing land rights in Florida pursuant to treaty with Spain of Feb. 22, 1819).

91. Klos, *supra* note 24, at 128.

92. Jan. 8, 1821, 7 Stat. 217-18, INDIAN AFFAIRS, *supra* note 2, at 195-97 (proclaimed Mar. 2, 1821); PRUCHA, *supra* note 2, at 461.

93. See GIDDINGS, *supra* note 1, at 62 (noting U.S. government’s treatment of “negroes, cattle and horses” as “property” that Creeks were to return to United States).

94. See *id.* at 60 (noting Georgia’s desire to gain “compensation for the loss of her slaves”).

95. *Id.* at 63.

96. *Id.*

97. See *id.* (noting additional \$250,000 set aside to slaveholders). Out of the \$250,000, only \$109,000 was found to be owed on claims for slaves and property

tion, all right and title to this property—i.e., to the persons claimed as fugitive slaves or their descendants—were assigned and transferred to the United States, to be held in trust for the benefit of the Creeks.<sup>98</sup> In other words, the U.S. government itself became a slaveowner.

In 1823, for the first time, the U.S. government concluded a treaty directly with the Seminoles. The Treaty of Moultrie Creek<sup>99</sup> provided that the Seminoles would cede their very fertile land in north Florida and receive a large but much less desirable tract farther south. They also received \$6,000 worth of goods, rations for a year and a promise of \$5,000 per year for twenty years.<sup>100</sup> One of the U.S. negotiators wrote privately to Secretary of War John C. Calhoun, “It is not necessary to disguise the fact to you, that the treaty effected was in a degree a treaty of imposition. The Indians would never have voluntarily assented to the terms had they not believed that we had both the power and disposition to compel obedience.”<sup>101</sup>

With white settlers moving into north Florida, the issue of fugitive slaves had taken on added significance. In the Treaty of Moultrie Creek, the United States dealt with this matter directly with the Seminoles for the first time. Article 7 of the treaty bound the Seminoles to be “active and vigilant in preventing the retreating to, or passing through, of the district assigned them, of any absconding slaves, or fugitives from justice,” and to deliver all such people to the agent.<sup>102</sup> Thus, the requirement that certain people be treated as property, a requirement imposed on states that did not recognize slavery by the Constitution,<sup>103</sup> and by the Fugitive Slave Laws of 1793 and 1850,<sup>104</sup> was made enforceable under international law as well.

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lost prior to 1802. Under the terms of the treaty, the Creeks should have received the remaining \$141,000. However, slaveholders petitioned Congress, and a committee found that the claimants had an equitable right to this money as indemnity “for the loss of the offspring which the Exiles would have borne to their masters had they remained in bondage.” *Id.* at 87-88.

98. *See id.* at 65-67 (describing assignment of title to United States).

99. Treaty of Moultrie Creek, Sept. 18, 1823, 7 Stat. 224-28, INDIAN AFFAIRS, *supra* note 2, at 203-07 (proclaimed Jan. 2, 1824); PRUCHA, *supra* note 2, at app. A.

100. *See* PRUCHA, *supra* note 2, at 151-52; Klos, *supra* note 24, at 129-30.

101. PRUCHA, *supra* note 2, at 152 (quoting letter of James Gadsden, Sept. 29, 1823).

102. Klos, *supra* note 24, at 129.

103. U.S. CONST., art. IV, § 2, cl. 3.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

*Id.*

104. *See* Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (amended 1850) (repealed 1864) (allowing masters to bring escaped slaves before any state official or judge, justice of peace, or magistrate and empowering these officials to issue certificates of removal if they determined that person seized was slave of claimant); Fugitive

The Treaty of Moultrie Creek required the Seminoles to provide a listing of Indian towns and a census of their inhabitants. The leader of the delegation, Neamathla, listed thirty-seven towns with 4,883 inhabitants, but refused to specify "the number of negroes in the nation."<sup>105</sup> By this time, as George Klos notes, "Seminole society had blacks of every status—born free, or the descendants of fugitives, or perhaps fugitives themselves. Some were interpreters and advisers of importance, others were warriors and hunters or field hands. Intermarriage with Indians further complicated black status."<sup>106</sup>

The white planters must have recognized the distinction between fugitive slaves and Black Seminoles, for they complained that the latter "aided such slaves to select new and more secure places of refuge."<sup>107</sup> One planter, after visiting several "Negro Villages" looking for runaways, reported that he could not determine the number of slaves living among the Seminoles because "of their being protected by the Indian Negroes . . . [who are] so artfull that it is impossible to gain any information relating to such property from them."<sup>108</sup> Nonetheless, the planters often took anyone of African descent whom they could capture—conduct that more closely resembled slave catching than the pursuit of fugitive slaves, which was still sanctioned by law.

The Indians complained that white settlers were taking black people from them, and a U.S. Army Lieutenant noted in 1825 that the planters used force against the Seminoles whenever they could "so that the whites might possess themselves of many valuable negroes."<sup>109</sup> Even Florida Governor DuVal, who had proposed that the government purchase black peo-

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Slave Act, 9 Stat. 402 (1850) (amending Act of Feb. 12, 1793, ch. 7, 1 Stat. 302) (repealed 1864); see also John Hope Franklin, *Race and the Constitution in the Nineteenth Century*, in *AFRICAN AMERICANS AND THE LIVING CONSTITUTION* 21, 25-27 (Franklin & McNeil ed., 1995) (describing how U.S. Constitution and Fugitive Slave Laws of 1793 and 1850 impacted African Americans); James Oliver Horton & Louis E. Horton, *A Federal Assault: African Americans and the Impact of the Fugitive Slave Laws of 1850*, 68 *CHI.-KENT L. REV.* 1179 (1993).

105. Klos, *supra* note 24, at 129.

106. *Id.* at 131. The Seminoles traced their lineage matrilineally, and had no reason to adopt the system of racial classification, rapidly emerging in U.S. law, which identified anyone with discernable African ancestry as "Black." See *Plessy v. Ferguson*, 163 U.S. 537, 538 (1896) (holding that Homer Plessy was appropriately classified as "colored" despite being of "seven eighths Caucasian and one eighth African blood"); *Doe v. Louisiana*, 744 So. 2d 369 (La. Ct. App. 1985) (affirming constitutionality of racial classifications based on Louisiana's "one thirty-second" statute); LOPEZ, *supra* note 15, at 118-19 (noting various states' statutory racial definitions). See generally C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1974) (describing implementation and eventual demise of Jim Crow laws in southern states).

107. Klos, *supra* note 24, at 131.

108. *Id.* at 132-33 (quoting letter of Owen Marsh to Thomas L. McKenney, May 17, 1826).

109. *Id.* at 135.

ple from the Seminoles because individual whites were prohibited from slave trading, wrote the Superintendent of Indian Affairs:

Their own negroes that have been taken from them are held by white people who refuse to dilliver [sic] them up. I have felt ashamed while urging [sic] the Indians to surrender the property they hold, that I had not power to obtain for them their own rights and property held by our citizens . . . . To tell one of these people that he must go to law for his property in our courts with a white man is only adding insult to injury.<sup>110</sup>

Colonel Brooke, commander of the Tampa Bay army post said in 1828, that so many claims were made by white planters for black people living among the Indians that the Seminoles "[began] to believe that it is the determination of the United States to take them all. This idea is strengthened by the conversations of many of the whites . . . ."<sup>111</sup>

The Seminoles were thus subject to increasing pressure, due in part to the Treaty of Moultrie Creek, which was enforced as if the Seminoles were obliged to turn over all people of African ancestry. In addition, as white settlements expanded and the number of slaves who escaped to Indian territory grew, there was increasing pressure on the government to force all of the Indians to the west. Giddings says:

[The compact of Moultrie Creek] drew still more closely the meshes of the federal power around the Exiles. The United States now held what is called in slaveholding parlance the "legal title" to their bones and sinews, their blood and muscle, while the Creek Indians were vested with the entire beneficial interest in them. But neither the United States nor the Creek Indians had been able to reduce them to possession. The white settlements were, however, gradually extending, and the territory of the Seminoles was diminishing in proportion; and it was easy to foresee the difficulties with which they were soon to be surrounded.<sup>112</sup>

In May 1830, Congress passed the Indian Removal Act<sup>113</sup> and provided \$500,000 for the negotiation of treaties to ensure the removal of Indians to the territory north of Texas and west of Arkansas.<sup>114</sup> In 1832, when a drought had devastated their crops and the Seminoles were on the

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110. *Id.* at 134.

111. *Id.* at 135. Even federal Indian agents were known to engage in the slave trade. See *id.* at 136-37 (discussing claims made for black people).

112. GIDDINGS, *supra* note 1, at 74.

113. Indian Removal Act of 1830, 4 Stat. 411, ch. 148, §§ 7-8, 4 Stat. 412 (1830) (current version at 25 U.S.C.A. § 174); see PRUCHA, *supra* note 2, at 161-65.

114. Klos, *supra* note 24, at 140.

verge of starvation,<sup>115</sup> the Treaty of Payne's Landing was signed.<sup>116</sup> Under its terms, removal was conditioned upon the Seminole nation's approval of a selected site. The Seminoles sent a delegation to explore the proposed area, and the delegates signed an agreement at Fort Gibson,<sup>117</sup> stating that the Seminole nation would settle among the Creeks in the West and become a constituent part of that tribe.<sup>118</sup> The delegates, however, had not been authorized to make this agreement and later denied having agreed to settle under Creek jurisdiction.<sup>119</sup> According to some accounts the federal agents refused to guide them home until they signed.<sup>120</sup> Nonetheless, despite rejection of the treaty by a majority of the Seminole nation, the U.S. government proceeded as if the treaty was binding.<sup>121</sup>

There were two problems with the treaty, if it can be called such. The first was the forced removal of the Seminoles from their homes and their lands through violence, trickery and empty promises. The second was the government's insistence on placing the Seminoles with the Creeks, with whom they had been at odds since at least 1750. Under the Treaty of Indian Springs, the Creeks had paid the slaveholders of Georgia for the loss of slaves, and therefore, under U.S. law, now "owned" those slaves, whoever they were.<sup>122</sup> The Seminoles were afraid that if they united with the Creeks, the Creeks would enslave those among them of African descent, claiming to have purchased them pursuant to the treaty.<sup>123</sup> The Black Seminoles and their allies were ready, therefore, to fight to the death rather than be removed.

This led to the Second Seminole War, which lasted from 1835 until 1842. Although it came to be known as the "longest and most expensive Indian war" waged by the U.S. government,<sup>124</sup> it was more accurately described by General Jesup, commander of the U.S. forces in Florida, who said in 1836, "This, you may be assured, is a negro and not an Indian

115. See MULROY, *supra* note 24, at 27; PORTER, *supra* note 24, at 31.

116. Treaty of Payne's Landing, May 9, 1832, 7 Stat. 368-70, INDIAN AFFAIRS, *supra* note 2, at 344-45 (proclaimed Apr. 12, 1834); PRUCHA, *supra* note 2, at app. A.

117. Treaty of Fort Gibson, Mar. 28, 1833, 7 Stat. 423-24 (proclaimed April 12, 1834); see, *supra* note 2, at 394-95; PRUCHA, *supra* note 2, at app. A.

118. See MULROY, *supra* note 24, at 27.

119. See GIDDINGS, *supra* note 1, at 84-85 (discussing Seminole delegation to inspect western lands).

120. See Klos, *supra* note 24, at 143 (describing conditions under which Fort Gibson Treaty was negotiated). Porter says the delegates were "intimidated for a month" at Fort Gibson before they signed. See PORTER, *supra* note 24, at 32.

121. See PORTER, *supra* note 24, at 32 (discussing U.S. perspectives and actions regarding Fort Gibson agreement); Klos, *supra* note 24, at 145-47 (same).

122. For a discussion of the Treaty of Indian Springs, see *supra* notes 92-98 and accompanying text.

123. See PORTER, *supra* note 24, at 33 (describing concerns of Seminoles in context of Treaty of Indian Springs); Klos, *supra* note 24, at 144 (expanding on same).

124. See Klos, *supra* note 24, at 150.

war.”<sup>125</sup> According to Giddings, the Second Seminole War resulted in over five hundred persons seized and enslaved, and the expenditure of \$40 million of federal funds. He says, “[E]ighty thousand dollars was paid from the public treasury for the enslavement of each person, and the lives of at least three white men were sacrificed to insure the enslavement of each black man.”<sup>126</sup>

According to Kenneth Porter, “Until the Vietnam conflict, the Second Seminole War was the longest war ever fought by the United States—and like the Indochina fiasco, it did not end with an American victory.”<sup>127</sup> In early 1838, Jesup tried to negotiate a settlement by allowing some Seminoles to stay in the very south of Florida, and inducing the Black Seminoles to split from them by offering that all who “separated themselves from the Indians and delivered themselves up to the Commanding officer of the Troops, should be free.”<sup>128</sup> Hundreds of Seminoles assembled for a conference called by Jesup to discuss his plan, but in the meantime the Secretary of War rejected his proposal. Rather than telling the Seminoles, Jesup ordered his troops to surround and capture them, and he then shipped them to the western territories.<sup>129</sup>

Band by band, most of the Seminoles were eventually forced to go west. However, large groups refused to move onto Creek lands and lived for years off the generosity of the Cherokees until they were finally given their own lands.<sup>130</sup> A few bands remained in the Everglades, living peace-

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125. MULROY, *supra* note 24, at 29. According to Mahon, “Obviously the Second Seminole War was connected intimately with the nation’s number one problem of slavery. At the start the connection was not generally apparent, but as the war progressed, and the slavery issue grew year by year more deadly, the relationship became crystal clear.” MAHON, *supra* note 24, at 326.

126. GIDDINGS, *supra* note 1, at 315. Porter puts the cost of the Second Seminole War at “well over \$20 million,” with 1500 U.S. military deaths in addition to the fatalities among white settlers and militiamen. See PORTER, *supra* note 24, at 106 (noting ramifications of Second Seminole War); see also MULROY, *supra* note 24, at 29. Mahon reports, “Money costs of the war are given variously at from \$30 to \$40 million. As far as is known, no analytical study of costs has ever been made.” MAHON, *supra* note 24, at 326.

127. PORTER, *supra* note 24, at 107. The Seminoles never surrendered, but small groups were captured or agreed to move west until, in August 1842, Colonel Worth was authorized to end the war. See *id.* (discussing impact and termination of Second Seminole War).

128. *Id.* at 95.

129. See *id.* at 96 (highlighting actions of General Jesup during Second Seminole War).

130. See *id.* at 111, 116 (same). A treaty enacted on January 4, 1845, allotted separate land to the Seminoles and granted them local autonomy, although they were under the general authority of the Creek council. See *id.* at 116; Treaty of Jan. 4, 1845, 9 Stat. 821-25, INDIAN AFFAIRS, *supra* note 2, at 550-52 (proclaimed July 18, 1845), PRUCHA, *supra* note 2, at app. A.

According to the District Court for the Western District of Arkansas, some lands that were ceded to the Creeks in 1833 were conveyed to the Seminoles by a treaty in Aug. 7, 1856. See *United States v. Payne*, 8 F. 883, 886-87 (W.D. Ark. 1881) (describing distribution of U.S. lands). The Seminoles then conveyed these lands



fully until the white settlers' pressure for removal resulted in a Third Seminole War (1855-1858), which destroyed most of the remaining villages and sent another group of Seminoles west.<sup>131</sup>

General Jesup promised the Black Seminoles "that if they surrendered and agreed to emigrate they would be settled in a separate village . . . under the protection of the United States, as a part of the Seminole Nation, and were never to be separated or sold."<sup>132</sup> But General Zachary Taylor, who replaced Jesup, promised the rest of the Seminoles who surrendered and agreed to emigrate that they "would be secure in their property, including their slaves."<sup>133</sup> Thus, each Black Seminole who went west was labeled either "slave" or "free." This distinction would not have had much effect within Seminole society as it existed in Florida, but it now took on much more significance.

The Creeks claimed almost all Black Seminoles as their property, arguing that they or their ancestors had fled from the Creeks; that the Creeks had paid for the runaways pursuant to the Treaty of Indian Springs; and that the Creeks who had fought the Seminoles in Florida had never received the payment promised by the U.S. government for the black people they had captured.<sup>134</sup>

But Creek claims were not the only danger to the Black Seminoles. Unscrupulous slave traders—white and Indian—would "buy title" to a black person and then, regardless of the validity of that title, sell it to a white slave trader who would sell the black person into slavery.<sup>135</sup> This escalated into blatant slave-catching raids in which even children were kidnapped from their homes and sold.<sup>136</sup>

Giddings noted that the only reasonable response was to leave the U.S.:

They had witnessed the duplicity, the treachery of our Government often repeated . . . . They had, most of them, been born in freedom—they had grown to manhood, had become aged amidst persecutions, dangers and death—they had experienced the constant and repeated violations of our national faith: its perfidy was no longer disguised; if they remained, death or slavery would constitute their only alternative. One, and only one, mode of avoiding such a fate remained—that was, to leave the territory,

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to the United States on March 21, 1866, so that the government could settle "other Indians and freedmen thereon." *Id.* at 887.

131. See PORTER, *supra* note 24, at 267-83 (describing effects of Second Seminole War). Some, however, were never removed, and approximately 2000 Seminole Indians live on six reservations in Florida today. See Kly, *supra* note 28, at 48 n.21.

132. PORTER, *supra* note 24, at 118.

133. *Id.*

134. See *id.* at 119 (noting default on Creek remuneration).

135. See *id.* (discussing mechanics of slave trade).

136. See *id.* at 116-23 (describing brutality of slave catching activities).

the jurisdiction of the United States, and flee beyond its power and influence.<sup>137</sup>

Several hundred Black Seminoles left the reservation in 1850, pursued by slave-catchers, and made their way across the Rio Grande to Mexico, which had abolished slavery in 1829.<sup>138</sup> They negotiated with Santa Ana, and established towns, where some of their descendants still live.<sup>139</sup>

Even in Mexico, however, the Seminoles were not safe, for U.S. slave-catchers disregarded the border just as they had in Spanish-controlled Florida. In 1825, the United States had negotiated the inclusion of a provision for the "regular apprehension and surrender . . . of any fugitive slaves" in a Treaty of Amity, Commerce, and Navigation, but the Mexican government would not ratify the Treaty until the provision was removed.<sup>140</sup> In 1850 the U.S. government again tried and failed.<sup>141</sup>

In 1851, between three and four hundred former Texas Rangers, led by John "Rip" Ford, organized an invasion in support of Carvajal, who intended to create a separate republic in the north of Mexico, and who promised to enact a slave rendition law once he was in power. The former Rangers took the town of Camargo and held Matamoros for nine days before being driven back by Mexican and Seminole forces.<sup>142</sup> In the meantime, while many of the Seminoles were so occupied, Texas slave hunters planned an attack on a Seminole community in Mexico. According to Mulroy, "the Mexican authorities assembled 150 volunteers, who marched to La Sauceda . . . and fought off the slave hunters. Hearing of this, the Adams party [also slave hunters] turned southwest . . ., captured a black family living at Muzquiz, and then retreated to Texas."<sup>143</sup>

In 1857, Mexico passed a law protecting fugitive slaves from extradition and included the law in its new constitution.<sup>144</sup> The same year, Texas encouraged its citizens to violate Mexican sovereignty by passing the *Act to Encourage the Reclamation of Slaves, Escaping Beyond the Limits of the Slave Territories of the United States* and allocating state funds to reward those who

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137. GIDDINGS, *supra* note 1, at 332.

138. *See id.* at 332-35 (describing Seminole migration to Mexico in 1850); KATZ, *supra* note 24, at 73-75 (discussing Seminole movement in Mexico); Bruce Zagaris & Julia Padierna Peralta, *Mexico-United States Extradition and Alternatives: From Fugitive Slaves to Drug Traffickers—150 Years and Beyond the Rio Grande's Winding Courses*, 12 AM. U. J. INT'L L. & POL'Y 519, 523 (1997) (same).

139. *See* KATZ, *supra* note 24, at 73-75 (describing Black Seminole movement to Mexico); MULROY, *supra* note 24, at 71 (same); PORTER, *supra* note 24, at 127-47 (same).

140. . Zagaris & Peralta, *supra* note 138, at 524.

141. *See* MULROY, *supra* note 24, at 69 (noting Seminoles were still exposed to slave catchers in Mexico).

142. *See id.* (describing Carvajal invasion).

143. *Id.* at 70.

144. *See* Zagaris & Peralta, *supra* note 138, at 524.

captured fugitive slaves.<sup>145</sup> As a result of these raids, the Mexican authorities eventually moved the Seminoles further inland.<sup>146</sup> After the Civil War, some of the Seminole maroons moved back to Texas where, continuing its policy of divide and conquer, the U.S. government employed them as "Seminole Negro Indian Scouts,"<sup>147</sup> who helped the U.S. Army suppress other Indians and reinforce the Mexican border.<sup>148</sup>

### III. THE INFLUENCE OF SLAVEHOLDING INTERESTS ON LAW AND POLICY

What was going on in these early struggles to capture the "Exiles of Florida"? Those who wanted to profit from slavery—either by using slave labor or by engaging in the sale of slaves—had ensured that the federal government, the Constitution and the legal system were designed to protect slavery, and they used the armed might of the government to enforce, both domestically and internationally, what they defined as their "property rights" under the law.<sup>149</sup> They were, however, willing not only to shape the law to protect these "rights," but to disregard the law where profit was at stake. As we examine the relationship between slaveholding interests and the U.S. government, we see that the government not only used its power, both legal and military, to protect the profitability of slavery, but, in the end, literally became that which it was protecting—a slaveholder.

#### A. *The Shaping of International Law to Promote Slavery*

Pressured by powerful slaveholding interests, the U.S. government attempted, with considerable success, to build protections for slavery into

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145. See *id.* In 1861, Mexico and the United States finally concluded an extradition treaty which prohibited the extradition of fugitive slaves. However, shortly thereafter, Texan slaveowners entered into a secret agreement with the governor of the northeastern Mexican state of Tamaulipas to exchange fugitive slaves for Mexican peons fleeing to the north. See *id.*

146. See MULROY, *supra* note 24, at 71 (discussing Mexican aid to Seminole nation).

147. See *id.* at 113-32 (describing impact of Seminole maroons on Army border suppression).

148. See KATZ, *supra* note 24, at 76-82 (same); see also Carl Hartman, *Traveling Show Celebrates Communities of Escaped Slaves*, ASSOC. PRESS, Mar. 26, 1999, available in Westlaw, ASSOCPR Database (discussing Seminole history). He notes that near Brackettville, Texas, "fewer than 100 people now live in what may be the only settlement in the United States descended from escaped slaves," and "[s]ome black Seminoles still live in the Mexican village called Nacimiento de los Negros . . . about 150 miles southwest of Brackettville." *Id.*

149. See Paul Finkelman, *The Complete Anti-Federalist Edited by Herbert J. Storing*, 70 CORNELL L. REV. 182, 189 (1984) (book review) (discussing split between northern and southern anti-federalists on slavery and military action)). Finkelman says that northern antifederalists were afraid that they would be forced to take up arms to defend slavery, while southern antifederalists worried that the war power would be used to end slavery. See *id.* He notes, "[T]roops of the national government were used to suppress slave rebellions, and to fight a war with the Seminole Indians that, at least in part, concerned runaway slaves. Both federal troops and the state militias . . . were ordered to help return fugitive slaves to the South." *Id.*

international law. Beginning with the new nation's first treaty,<sup>150</sup> U.S. agents tried to negotiate international agreements requiring other sovereign nations—the Creeks and Seminoles,<sup>151</sup> as well as Britain, Spain and later Mexico—to capture Black Seminoles and turn them over to U.S. agents who would enslave or re-enslave them.<sup>152</sup> In treaties with these nations, the U.S. included indemnification for lost property, and then tried to enforce a definition of “property” which included both people who had escaped from slavery, and those who, by virtue of their African heritage,

150. For a discussion of this treaty, see *supra* notes 49-58 and accompanying text.

151. There is disagreement over the extent to which the United States' dealings with Indian nations falls within international law. In 1941, Felix Cohen summarized the basic principles of the U.S.' position:

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state; (2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government; and (3) these powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.

FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 123 (1941), quoted in David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1574 (1996) (discussing federal judicial impact on Indian governmental structures). These principles are rooted in three opinions written by Chief Justice Marshall. See *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) (holding title of conqueror is superior to that of native people); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) (holding that Indian nation is not foreign state and may not sue in U.S. courts); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Britain, as the colonial power, and then the United States, initially treated the Indian nations as independent sovereigns but justified the taking of Indian lands under the notion of “discovery” as enshrined in the international law of the period. See Getches, *supra*, at 1577 (discussing Marshall Court's justification of takings); see also Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 11 (1983) (discussing European roots of discovery notion).

As the relative power of the Indian nations declined, their sovereignty meant less. First they lost the ability to govern their external relations with other sovereigns; then they began losing their ability to govern themselves internally. Thus, we go from an early period of treaties and alliances to the 1871 Act, which banned further treaty-making with the Indians. See PRUCHA, *supra* note 2, at 289-310 (delineating history of decline of Indian sovereignty and treaty making). Nonetheless, in the context of this Essay, my point is that the United States imposed its definition of persons as property on other nations and peoples, using international law where it could, and violating it when it saw fit. To the extent it imposed these notions on the Creeks and Seminoles through treaties, political and economic power and warfare, it was engaging, I believe, in conduct within the realm of international law.

152. For a discussion of U.S. relationships with Britain, Spain and Mexico, see *supra* notes 59-79, 140-48 and accompanying text.

were presumed under U.S. law to be slaves.<sup>153</sup> Under this interpretation of the law, if another nation gave sanctuary to people fleeing slavery, it owed the United States money, as if its citizens had stolen horses or ships.

The United States engaged in three wars against the Seminoles.<sup>154</sup> Each was, as commanding General Jesup said of the Second Seminole War, "a negro war,"<sup>155</sup> not because the Indians happened to have Black allies who fought with them, but because the U.S. government was fighting people of African descent to preserve the institution of slavery. Tens of millions of federal dollars and thousands of lives were lost trying to keep Florida from becoming a safe haven for fugitive slaves and, in the process, allowing military forces to engage in profitable ventures of slave-catching and piracy.<sup>156</sup>

In 1836, in an effort to enlist Creek support in the war against the Seminoles, General Jesup "stipulated to pay them a large pecuniary compensation, and to allow them to hold all the plunder (negroes) whom they might capture, as *property*."<sup>157</sup> Black people were thus both the enemy and booty which could be captured in war. The following summer, Jesup paid the Creeks \$8,000 for "some ninety runaways" they had captured, thus "making the U.S. government a slave owner."<sup>158</sup> General Jesup also motivated his own troops by encouraging them to steal from the Indians. "Their *negroes*, cattle and horses, as well as other property which they possess, will belong to the corps by which they are captured."<sup>159</sup> According to Giddings, these arrangements, documented in Jesup's letters and duly cer-

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153. This position was perhaps best articulated by Justice Taney in the Dred Scott case: "[A]ll of them had been brought here as articles of merchandise. The number that had been emancipated at the time were identified in the public mind with the race to which they belonged, and regarded as part of the slave population rather than the free." *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1856).

On the presumption of slave status, see generally A. Leon Higginbotham, Jr. and Greer C. Bosworth, "Rather Than the Free": *Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17 (1991) (showing how slavery jurisprudence determined the status of free blacks in Virginia); A. Leon Higginbotham, Jr. & F. Michael Higginbotham, "Yearning to Breathe Free": *Legal Barriers Against and Options in Favor of Liberty in Antebellum Virginia*, 68 N.Y.U. L. REV. 1213 (1993) (examining the race-based burden of proof in freedom suits brought in Virginia); Walter Johnson, *Inconsistency, Contradiction, and Complete Confusion: The Everyday Life of the Law of Slavery*, 22 L. & SOC. INQUIRY 405, 410 (1997) (noting that many southern states enacted laws establishing presumptions of slave status based on racial measurements).

154. For a discussion of the Seminole wars, see *supra* notes 80-131 and accompanying text.

155. See PORTER, *supra* note 24, at 107; MULROY, *supra* note 24, at 29 (noting perceptions of General Jesup regarding Seminole Wars). For a discussion of the Second Seminole War, see *supra* notes 124-29 and accompanying text.

156. For a discussion of the money spent by the United States, see *supra* note 126 and accompanying text.

157. GIDDINGS, *supra* note 1, at 158.

158. PORTER, *supra* note 24, at 81. For a discussion of U.S. "ownership" of these slaves, see *infra* notes 178-80 and accompanying text.

159. GIDDINGS, *supra* note 1, at 158 (emphasis in original).

tified to and approved by the War Department, show "that the war was to be conducted by the organization of slave-catching forays, in which the troops were expected to penetrate the Indian Country for the purpose of capturing negroes."<sup>160</sup>

Slaveholders' and slave traders' interests thus carried enough weight in the federal government to protect their property interests in domestic law, and then to create international law—primarily treaties—to protect these interests. Public resources, including millions of taxpayer dollars and the strength of the U.S. military, were then used to enforce that law. Those who benefited from slavery, however, were just as willing to use the power of the government to violate international law when it appeared that adherence to the law might diminish their profits.

### B. *Violating International Law to Expand Slavery*

Initially, Spanish sovereignty in Florida was violated by locally organized groups of U.S. slave-catchers, activity which the federal government had an obligation to prevent, but did not. Beginning in 1811, Congress and the President explicitly approved a plan to invade Florida with the intent of gaining possession of the territory.<sup>161</sup> The three invasions which ensued violated the most basic principles of customary international law,<sup>162</sup> as well as a treaty of friendship with Spain.<sup>163</sup> During these invasions, peaceful settlements of Seminoles were attacked, villages and crops burned, and civilians killed and enslaved.<sup>164</sup> In 1816, U.S. troops attacked the fort that the British turned over to the Seminoles, despite the fact that it was sixty miles from the U.S. border and there had been no provocation

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160. *Id.* at 159.

161. For a discussion of U.S. invasions of Florida, see *supra* notes 66-79 and accompanying text.

162. The right of a sovereign state to defend its territorial integrity is one of the most basic precepts of international law. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 176-83 (2d ed. 1993) (discussing territorial rights under customary international law). He quotes the International Court of Justice in the *Corfu Channel* case: "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law." *Id.* at 181 (quoting 1949 I.C.J. Reports 4, 35). This was reaffirmed by the I.C.J. in the *Nicaragua* case: "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principal [sic] are not infrequent, the Court considers that it is part and parcel of customary international law." *Id.* (quoting 1986 I.C.J. Reports 14, 106).

163. For a discussion of the treaty with Spain, see *supra* note 67 and accompanying text.

164. See MULROY, *supra* note 24, at 13 (quoting the American commander of an 1813 raid: "Tuesday, Febr. 11 was employed in destroying the Negro town shown us by the Prisoners. We burnt three hundred and eighty six houses; consumed and destroyed from fifteen hundred to two thousand bushels of corn; three hundred houses and about four hundred cattle. Two hundred deerskins were found.").

by its residents. Hundreds of men, women and children were burned alive, captured leaders were tortured, and those who survived the attack were sold into slavery, all in violation of the most basic principles of international law.<sup>165</sup> The U.S. government ignored the protests of the Spanish government, and the U.S. military personnel who participated were later paid a bonus by Congress.<sup>166</sup>

In making and breaking treaties with the Creeks and the Seminoles, the United States violated international law in the ways that it did with most other Indian nations—coercing or tricking them into signing treaties that robbed them of their land and then failing to live up to the promises made in return.<sup>167</sup> As Giddings says of the 1821 agreement with the Creeks, “[t]hose acquainted with the usual modes of negotiating Indian treaties, by the use of intoxicating liquors, by bribery, and those appliances generally used on such occasions, will not wonder at the stipulations contained in the Treaty of ‘Indian Spring.’”<sup>168</sup>

The treaties negotiated with the Creeks and the Seminoles involved additional violations attributable to the United States’ interest in obtaining not just land, but slaves as well. The treaties, of course, included provisions relating to the safeguarding and return of property.<sup>169</sup> The Indians, however, were not given a say in how “property” was defined; the United States simply imposed its definition, which included persons who had been enslaved, were the descendants of former slaves, or simply were presumed to be slaves due to their African ancestry. Scott McCabe reports that, in 1852, Congress debated the legal status of Black Seminoles who were claimed by a white planter:

U.S. Rep. William A. Sackett of New York argued for freedom. “Where is the evidence that these humble Negroes, taken in the heat of battle, fighting for their rights and liberties, nobly sacrific-

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165. For a discussion of the U.S. attack on the fort, see *supra* notes 80-86 and accompanying text. Giddings says:

The barbarous practice of enslaving prisoners captured in war, had been repudiated by all Christian nations for more than two hundred years. The civilization of the sixteenth century had brought that atrocious practice into disrepute, which was now resorted to and renewed in the nineteenth, by this American Republic, so boastful of its refinement and Christianity.

GIDDINGS, *supra* note 1, at 131.

166. According to Giddings, in 1838, Congress passed a bill providing \$5,000 for the participating officers, marines and sailors “as compensation for their *gallant* services.” *Id.* at 43.

167. See generally EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION (Oren Lyons & John Mohawk eds., 1992); Williams, *supra* note 4; Robert A. Williams, Jr., *Columbus’ Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples’ Rights of Self-Determination*, 8 ARIZ. J. INT’L & COMP. L. 51 (1951).

168. GIDDINGS, *supra* note 1, at 63.

169. For a discussion of these treaties, see *supra* notes 49-58, 92-112 and accompanying text.

ing their lives in the defense of their country, in the defense of their home, in the defense of their nationality, were slaves?"

Rep. John Daniel of North Carolina countered: "A man is assumed to be a slave because he is black."<sup>170</sup>

The United States also imposed its definition of national jurisdiction on the parties. Despite the fact that the Seminole nation existed independently of the Creeks since at least 1750, until 1823 the United States negotiated treaties with the Creeks and then attempted both to enforce the treaties against the Seminoles and hold the Creeks liable for Seminole action, despite protests from both Creeks and Seminoles.<sup>171</sup>

For example, in the negotiations of the 1821 Treaty of Indian Springs, the Creeks objected that they promised, in the 1790 Treaty of New York, only to turn over those "prisoners and Negroes" who were in their nation, not those in the Seminole nation. The Georgia commissioners, however, responded that the Seminoles were part of the Creek Nation, and therefore the Creeks were responsible for their actions.<sup>172</sup> For their part, the Seminoles had:

refused to recognize the treaty, insisting that they were not bound by any compact, arrangement or agreement, made by the United States and the Creeks, to which they were not a party, and of which they had no notice; that they were a separate, independent tribe; that this fact was well known to both Creeks and the United States; and that the attempt of those parties to declare what the Seminoles should do, or should not do, was insulting to their dignity, to their self-respect, and only worthy of their contempt. They therefore wholly discarded the treaty, and repudiated all its provisions.<sup>173</sup>

Even if one considers such treaties valid under international law, the United States violated the provisions when doing so benefited the interests of slaveholders. As discussed above, \$250,000 allocated to the Creeks under the Treaty of Indian Springs was set aside to pay claims by slaveholders who asserted that they had lost slaves to the Creeks.<sup>174</sup> This, of course, could only be done by forcing the Creeks to accept "property" under the 1790 treaty as including persons. Even then, only \$109,000 worth of claims was approved, so the Creeks should have been paid the remaining

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170. Scott McCabe, *Black Seminoles Fight for Equality; Lawsuit Against U.S. Seeks Eligibility for Indian Benefits*, PALM BEACH POST, July 25, 1999, at 1A. For a discussion of the presumption that a black person was enslaved, see *supra* note 153 and accompanying text.

171. For a discussion of the U.S.' refusal to recognize Seminole sovereignty, see *supra* notes 56-58, 92-98 and accompanying text.

172. GIDDINGS, *supra* note 1, at 63.

173. *Id.* at 16.

174. For a discussion of the Treaty of Indian Springs, see *supra* notes 92-98 and accompanying text.



\$141,000. Disregarding its obligations under the treaty, Congress proceeded to give those funds to slaveholders as compensation for the "lost profits" they would have made, had the slaves they claimed to have lost reproduced.<sup>175</sup>

After the Seminoles were forced to move west, General Jesup's promise of freedom was not honored, and Black Seminoles continued to be kidnapped and sold into slavery.<sup>176</sup> They fled once again, leaving the United States altogether and settling in Mexico. The United States then pressured the Mexican government to return the maroons and, when that failed, it sanctioned slave raids across the border, engaging once again in the slave trade and violating Mexican sovereignty as well as the rights of the Seminoles. Zagaris and Peralta, while apparently unaware that many so-called fugitive slaves were Seminoles fighting to remain free, summarize the border issues succinctly:

In Mexico the fugitive slave issue resulted in: frequent diplomatic overtures, as well as efforts to negotiate extradition treaties; private and state-sponsored expeditions across the border to recover runaway slaves; efforts by foreign citizens and officials to lure slaves across the border; refusal by the Mexican Government to return escaped slaves; discreet complicity by foreign officials near the border in United States initiatives to recover slaves; differences of opinion within Mexico regarding the desirability of inviting thousands of fugitive slaves into Mexican territory; and discussions of the issue of fugitive slaves and annexationist plots, filibustering expeditions, and the variety of transnational criminal activities engaged in by free whites from the United States.<sup>177</sup>

### C. *The Federal Government as Slaveholder*

In addition to considering these ways in which the United States violated international law in its treatment of the Black Seminoles, we must also note that in protecting the property interests of slaveholders, both through the law and through its foreign policy, the U.S. government used public funds to indemnify owners for the loss of their slaves, and then itself became a slave owner.<sup>178</sup>

In 1837, during the Second Seminole War, there was a dispute between Creek warriors and troops from Tennessee over the ownership of approximately ninety Black Seminoles who had been captured. General Jesup resolved the matter by issuing an order which stated:

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175. See GIDDINGS, *supra* note 1, at 88. For a discussion of this allocation of Creek monies, see *supra* note 97 and accompanying text.

176. See *id.* at 207.

177. Zagaris & Peralta, *supra* note 138, at 523.

178. For a discussion of public funds used by the United States to purchase slaves, see *supra* note 158 and accompanying text.

1. The Seminole negroes captured by the army, will be taken on account of Government and held subject to the *orders of the Secretary of War*.

2. The sum of eight thousand dollars will be paid to the Creek chiefs and warriors . . . in full for their claims . . . ;

3. To induce the Creeks to take alive, and not destroy, the negroes of citizens . . . a reward was promised them for all they should secure. They have captured and secured thirty-five, who have been returned to their owners. *The owners have paid nothing*, but the promise to the Indians must be fulfilled. The sum of twenty dollars will be allowed them for each, from the public funds . . . .

5. Until further orders, the Seminole negroes will remain at Fort Pike, Louisiana . . . . They will be fed and clothed at the public expense.<sup>179</sup>

Giddings summarizes the effect of this action:

This order was reported to the Secretary of War, and on the seventh of October was approved and became the act of the Executive; and the people of the nation became the actual owners of these ninety slaves, so far as the Executive could bind them to the ownership of human flesh.<sup>180</sup>

The decision to recognize slavery and, thus, certain classes of people as property under the law, was a political compromise struck to form the Union.<sup>181</sup> It was not, however, as some thought at the time and as it is often still portrayed, the mere tolerance of an economic system believed by many to be morally reprehensible.<sup>182</sup> Once slaves were defined as property, that property and its profitability could only be protected by operation of law. The Constitution guaranteed that the resources of the federal government would protect the slave trade for at least twenty years;<sup>183</sup>

179. GIDDINGS, *supra* note 1, at 161 (quoting Order No. 175, Tampa Bay, Sept. 6, 1837); see PORTER, *supra* note 24, at 81-82 (discussing wartime proclamations of General Jesup).

180. GIDDINGS, *supra* note 1, at 161.

181. For a discussion of the incorporation of slavery into the Constitution, see *supra* notes 13-16 and accompanying text.

182. See ALAN AXELROD, *THE COMPLETE IDIOT'S GUIDE TO AMERICAN HISTORY* 141 (1996). This succinctly states a fairly common, if inaccurate, view of the role of slavery in the founding of the nation:

The Declaration of Independence declared no slave free, and the Constitution mostly avoided the issue, except for the purpose of levying taxes, determining representation in Congress (for purposes of such enumeration, slaves were deemed three-fifths of a human being), and specifying that the slave trade (that is, importation) was to end within 20 years.

*Id.*

183. See U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of Such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and

would force non-slaveholding states to enforce the laws of slaveholding states;<sup>184</sup> and would provide the military force to suppress slave rebellions.<sup>185</sup> It then gave slaveholders a disproportionate influence in the government by counting a portion of this particular form of property, but no other, in determining the number of representatives a state would have in Congress.<sup>186</sup> Federal laws were passed to implement these guarantees,<sup>187</sup> federal monies were spent insuring this form of property,<sup>188</sup> and, as we have seen, international law was both made and broken to protect this form of property.<sup>189</sup> Finally, the people of the United States, through the federal government, became the owners of human beings.<sup>190</sup> The decision to recognize some persons as property made all citizens not just complicit, but active participants in the institution of slavery.

#### IV. THE LEGACY OF SEMINOLE POLICY: DAVIS V. UNITED STATES

The story of the Black Seminoles, from its first days, illustrates how the U.S. government's attitude toward, participation in and shaping of international law was inextricable from its support for the institution of slavery. Although slavery has been abolished, these first principles live on, both in specific ways and in the generalized acceptance of racial subordination for the purpose of protecting property and its profitability.

The story lives on, literally, for the descendants of the "Exiles of Florida." In 1996, Black members of the Seminole Nation of Oklahoma filed

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eight . . ."); U.S. CONST. art. V (prohibiting amendment of migration and importation provision).

184. See U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim . . .").

185. See U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State . . . a Republican Form of Government, and shall protect each of them . . . against domestic Violence."). See generally LYND, *supra* note 16; Finkelman, *supra* note 16.

186. See U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, . . . three fifths of all other Persons."). This clause is often misinterpreted as counting slaves as "three fifths of a person." In fact, this clause simply gave slaveholders disproportionate influence in Congress.

187. See, e.g., Fugitive Slave Act ch. 60, 9 Stat. 462 (1850) (repealed 1864); 25 U.S.C.A. §§ 171-72 (repealed 1934); see also, e.g., Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 Nw. U. L. Rev. 785, 802-59 (1995) (discussing anti-abolitionist restraints on free speech, petitioning, and use of the U.S. mails).

188. For a discussion of federal monies spent, see *supra* notes 63-64 and accompanying text.

189. For a discussion of the use and misuse of international law, see *supra* notes 149-77 and accompanying text.

190. For a discussion of the federal government's ownership of slaves, see *supra* notes 158, 178-79 and accompanying text.

suit against the Bureau of Indian Affairs ("BIA") and the U.S. government for discriminating against them by excluding them from monies to be paid to the Seminole Nation as compensation for land taken in Florida in the 1820s.<sup>191</sup> The *National Bar Association Magazine* summarized the case:

According to the complaint [in *Davis v. United States*], the plaintiffs . . . are Estelusti Seminoles, descendants of Black fugitives who fled plantations in the South and in the Caribbean to join secessionists from the Creek, Micco-suckee, and other Native American [nations]. Together these African American and Native American people settled in Florida in the eighteenth and nineteenth centuries and formed the Seminole Nation . . . . [I]n the 1820s and '30s, after bitter warfare against the U.S. Government, the Seminoles, including the Estelusti, were deprived of their lands and sent . . . to what is now Oklahoma. In 1990, the United States Government provided some \$56 million in compensation for this land taking. *However, the Bureau of Indian Affairs has ruled that the Estelusti may not participate in any way in the award or in other benefits, contending that in the nineteenth century they were slaves, not land owners.*<sup>192</sup>

How is it that nearly 150 years after their forced removal and their prolonged battles against slave-catchers, the Black Seminoles are still faced with such problems?

In 1893, Congress tried to dissolve what remained of Indian sovereignty by implementing a policy of "extinguishing Indian tribal lands, allotting the same in severalty among those entitled to receive them, and distributing Indian tribal funds."<sup>193</sup> Again, the U.S. government was imposing its property laws upon other peoples, this time to assimilate them forcibly. Massachusetts Senator Henry Dawes, "a distinguished Indian theorist,"<sup>194</sup> said of the Cherokees in 1885:

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191. See *Black Seminoles File*, *supra* note 26, at 24 (discussing *Davis* and history effecting case); *Davis v. United States*, 192 F.3d 951, 951 (10th Cir. 1999).

192. *Black Seminoles File*, *supra* note 26, at 23 (emphasis added) (Jon Velie, Esq. 405-364-2525, jvelie@velieandvelie.com). The Seminole Nation of Oklahoma today has about 14,000 members, in fourteen bands or clans. Two of the bands, the Dosar Barkus Band and the Caesar Bruner Bands are known as bands of "Seminole Freedmen." See generally Frazier, *supra* note 18 (discussing common history of Seminole and Gullah-speaking Africans).

193. *Seminole Nation v. United States*, 78 Ct. Cl. 455, 466 (1933) (1933 WL 1802). According to Joseph Singer, "The allotment policy was part of a larger assimilation policy. Granting individual rights to tribal members was intended to break tribal allegiances and eventually result in the dismantling of tribal governments." Joseph William Singer, *The Stranger Who Resides with You: Ironies of Asian-American and American Indian Legal History*, 40 B.C. L. REV. 171, 174 (1998) (joint publication with 19 B.C. THIRD WORLD L.J.).

194. ANGIE DEBO, AND STILL THE WATERS RUN 21 (1940).

The head chief told us that there was not a family in that whole nation that had not a home of its own. There was not a pauper in that nation, and the nation did not owe a dollar. It built its own capitol, in which we had this examination, and it built its schools and its hospitals. Yet the defect of the system was apparent. They have got as far as they can go, because they own their land in common . . . There is no enterprise to make your home any better than that of your neighbors. There is no selfishness, which is at the bottom of civilization. Till this people will consent to give up their lands, and divide them among their citizens, so that each can own the land he cultivates, they will not make much more progress.<sup>195</sup>

There was tremendous resistance among the Indians to the allotment plan. As Joseph Singer says, "the federal government was forcibly granting individual property rights to Indians who, for the most part, did not want those rights. They did not want these property laws because they came at a terrible price—the price of forced assimilation and conquest."<sup>196</sup>

Nonetheless, the federal government proceeded to make the allotments and, to do so, the members of each nation had to be identified. As we have seen, the Seminole Nation has had members of African descent since its inception.<sup>197</sup> In addition, at the end of the Civil War, the U.S. government concluded treaties with many Indian nations, including the Seminoles, providing that any slaves would be emancipated and the freedmen incorporated into the tribe "on an equal footing with the original members."<sup>198</sup> Senator Dawes became chair of a commission, which in 1906 created a list of approximately 3,000 Seminoles, about one third of whom were of African descent.<sup>199</sup> Although the Dawes commission was

195. *Id.* at 21-22.

196. Singer, *supra* note 193, at 174.

197. For a discussion concerning black members of the Seminole Nation, see *supra* notes 39-48 and accompanying text.

198. See *Seminole Nation*, 78 Ct. Cl. at 473 (holding that Seminole freedmen were part of the Nation for purposes of receiving land allotments). See generally *Seminole Nation v. United States*, 90 Ct. Cl. 151 (1940) (same); McREYNOLDS, *supra* note 24, at 314 (same).

Treaties were enacted abolishing slavery among the Indians because Indians were not considered U.S. citizens by virtue of the Fourteenth Amendment. See *Elk v. Wilkins*, 112 U.S. 94 (1884) (holding Indian born within United States, who voluntarily separates himself from tribe and resides with white citizens, is not citizen within meaning of Fourteenth Amendment). It was not clear whether the Thirteenth Amendment, abolishing slavery, would be similarly construed to exclude Indians. See *Nunn v. Hazelrigg*, 216 F. 330, 332-33 (8th Cir. 1914).

199. See McREYNOLDS, *supra* note 24, at 351 (including cite to Department of Interior report). According to Debo, "The first United States census of the Indian Territory, which was made in 1890, shows the approximate racial composition. It classed the inhabitants according to physical appearance without regard to citizenship" and reported within the Seminole nation: 172 Whites, 806 Negroes and 1,761 Indians. DEBO, *supra* note 194, at 13.

not required to create separate classes among the Seminoles, the membership list was divided into a "Seminole Blood Roll" and a "Freedmen Roll."<sup>200</sup>

"The Dawes Rolls are still used today to determine the members of the Seminole Nation. Anyone who can trace his or her ancestry to the Dawes Rolls is deemed to be a member of the Seminole Nation."<sup>201</sup> The Rolls still reflect the "Seminole Blood" and "Freedmen" categories. These groupings, however, provide only a fragmented reflection of the members' heritage. As the court noted in *Davis*, "Because the Seminole Nation is matrilineal, if an individual's mother was a Freedman and his father was Indian by blood, that individual was enrolled in the Freedmen Roll."<sup>202</sup> Similarly, an individual whose mother was Indian and father was black would be identified as Indian.

In 1950 and 1951, the Seminole Nation of Oklahoma and Seminoles still living in Florida filed claims for compensation for lands in Florida ceded to the United States in 1823.<sup>203</sup> In the late 1970s, the "Seminole Nation as it existed in Florida on September 18, 1823" was awarded \$16 million by the Indian Claims Commission.<sup>204</sup> In 1990, Congress finally passed an Act providing for the distribution of the funds, which, with interest, had grown to \$56 million,<sup>205</sup> but the Black Seminoles were excluded from participation in programs funded by this award.<sup>206</sup> In fact, the nation, "as it existed in 1823," clearly included Black Seminoles. They were, as we have seen, one of the U.S. government's primary reasons for

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200. *Davis v. United States*, 192 F.3d 951, 954-55 (10th Cir. 1999) (explaining Seminole bloodline classification); *Goat v. United States*, 224 U.S. 458, 468 (1912) (quoting Dawes Commission Report of 1898, which said that "while the law does not specifically require a separate roll of each of these classes, the commission's data will enable it to so separate them").

201. *Davis*, 192 F.3d at 954-55.

202. *Id.* at 954.

203. *See United States v. The Seminole Indians*, 180 Ct. Cl. 375, 377 (1967) (noting Indian plaintiffs' claim to Florida).

204. *Id.* Sept. 18, 1823 is the date of the signing of the Treaty of Moultrie Creek, the United States' first official recognition of the Seminoles as a separate nation. For a discussion of the Treaty, see *supra* notes 99-106 and accompanying text. The monies awarded to the Seminoles (the distribution contested in the *Davis* case) were for the inadequacy of compensation received under the terms of the Treaty of Moultrie Creek. The United States argued that the Seminoles' use and occupancy of most of the Florida peninsula prior to 1823 was not sufficient to support recognition of "original or Indian" title, but the Court of Claims found in 1967 that it was reasonable to say the "Seminole 'use and occupancy' was adequate to sustain a claim of original title to the Florida peninsula." *Id.* at 385.

205. *See* Act of Apr. 30, 1990, Pub. L. No. 101-277, 104 Stat. 143 (1990) (allocating judgment funds for Seminoles); *see also* Plan for the Use of the Seminole Nation of Oklahoma Indian Judgment Funds, 56 Fed. Reg. 32,480 (proposed Jan. 30, 1991) (delineating management and use of judgment funds).

206. *See Davis*, 192 F.3d at 955-56 (discussing Seminole participation in distribution of congressional funds).

taking the land away from the Seminoles in the first place.<sup>207</sup> Nonetheless, the unique history of the Seminole Nation has not been recognized by the Bureau of Indian Affairs, and Black Seminoles have been treated as if they were, in fact, property until they were deemed members of the Seminole Nation pursuant to the Treaty of 1866. The government's position in the *Davis* case is that "[b]ecause the Estelusti Seminoles were not expressly recognized as members of the Seminole Nation until the 1866 Treaty, the effect of the Eligibility Requirement is to exclude the Estelusti Seminoles from participating in any Judgment Fund Program that conditions participation on meeting the Eligibility Requirement."<sup>208</sup>

Plaintiffs' lawyer Jon Velie calls the government's position "a classic U.S. strategy of divide and conquer."<sup>209</sup> The justifications offered by the BIA and current Seminole leadership are: (1) that the Black Seminoles were not expressly recognized as members of the Seminole Nation until the United States no longer recognized them as slaves and incorporated this change into the 1866 Treaty; and (2) that separate rolls have been kept since the days of the Dawes Commission.<sup>210</sup>

These justifications are premised, first, on an acceptance of the notion—purportedly eliminated from our law with the abolishing of slavery—that Black Seminoles were not original members of the Seminole Nation, but were "property," simply because they were of African descent, and, second, on the acceptance of the validity of Jim Crow classifications—also purportedly a relic of the past.<sup>211</sup> As one newspaper article said of one plaintiff, "Despite the fact that his ancestors fought fiercely for their freedom alongside the Seminole Indians nearly two centuries ago, Donnell Davis is waiting for the [courts] to validate his heritage."<sup>212</sup>

We come to such results because, despite the fact that slavery has been abolished for at least five generations and is now popularly, if not legally, acknowledged to have been wrong, there have been no systematic efforts to remove the vestiges of slavery from the law. With such interpretations, the government is continuing a long history of refusal to acknowl-

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207. For a discussion of the U.S. government's motivation for taking the land, see *supra* notes 92-131 and accompanying text.

208. *Davis*, 192 F.3d at 956.

209. Scott McCabe, *Black Seminoles "Back in the Fight" for Indian Benefits, Payout Money*, PALM BEACH POST, Sept. 23, 1999, at 1A. The Court of Claims, ruling that "freedmen" had equal property and civil rights with "fullblood" Seminoles, noted, "It is impossible to find in the history of the Seminoles a trace of hostility towards their slaves or freedmen. No such characteristic may be ascribed to the tribe until the final question of allotments arose, more than two decades after the execution of the treaty of 1866." *Seminole Nation v. United States*, 78 Ct. Cl. 455, 464 (1933).

210. *Davis*, 192 F.3d at 955-956. See generally *Black Seminoles File*, *supra* note 26.

211. According to plaintiffs' lawyer Jon Velie, "The United States is superimposing its own philosophy on the tribe . . . . The government is going back in time and using the two most heinous laws in U.S. history—slavery and segregation." McCabe, *supra* note 209, at 1A.

212. *Id.*

edge the resistance of those who were enslaved. The 1866 Treaties appeared to be instruments of liberation, proclaiming that all slaves residing with Indian nations were to be considered full citizens of the nations.<sup>213</sup> In fact, they have been used to twist history to mean not that any slaves who did reside with the Indians would be free, but that all people of African descent who did so must have been slaves before 1866. Even the current use of the term "Freedmen" to describe Seminoles of African descent implies that they were enslaved until freedom was bestowed upon them by an outside or governmental source.

As Y.N. Kly argues, the alliance of the maroons "with the Indian First Nations . . . provided the U.S. colonists with a credible cover to disguise the fact that African Americans were resisting their enslavement 'en masse,' and posing a credible politico-military threat to the existence of the U.S. enslavement institutions, and thereby to the U.S. itself."<sup>214</sup> This history is masked by minimizing the extent of participation and leadership exercised by Seminoles of African descent by calling them the Seminoles' allies, or interpreters or slaves, rather than acknowledging that those who were referred to as "property" in U.S. law and treaties made with the Indians were, in fact, Seminole leaders.<sup>215</sup>

The *Davis* case is still being litigated.<sup>216</sup> Regardless of its outcome, we see, after sorting through the complications of this story, that the National Bar Association Magazine's summary captured the bottom line: the government is still, after all these years, defining the Black Seminoles not by the status that their ancestors created for them, but in the terms of the slaveholders and slave-catchers and the law as it existed prior to 1866. People of African descent participated in the formation of the Seminole nation before the United States even existed as a nation,<sup>217</sup> but in the year

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213. For a discussion of the 1866 Treaties, see *supra* notes 198, 208 and accompanying text.

214. Kly, *supra* note 28, at 27. Thus, for example, the Stono Rebellion, which took place within 20 miles of Charleston, and in which approximately 100 African Americans were killed or executed, was not even reported in the South Carolina Gazette. See *id.* at 24, 28 (describing public perceptions of Seminole resistance).

215. Giddings describes the former slave Louis, who was "fond of reading . . . and could probably speak and write more languages with ease and facility than any member of [the House of Representatives] . . ." as standing "shoulder to shoulder in every battle" with the Indian leader Coacoochee, later known as 'Wild Cat.'" GIDDINGS, *supra* note 1, at 114. Kly characterizes the problem by saying, "Any mention of joint Seminole Indian and Gullah initiatives always put the Gullah in the 'Tonto' position . . ." Kly, *supra* note 28, at 29.

216. See *Davis*, 192 F.3d at 962 (reversing district court). In 1999, the United States Court of Appeals for the Tenth Circuit reversed the district court's dismissal of the plaintiffs' claims based on the BIA's refusal to issue them Certificates of Degree of Indian Blood, and remanded on the question of whether the Tribe was an indispensable party for purposes of determining a request to dismiss based on Rule 19(b) of the Federal Rules of Civil Procedure. See *id.* (detailing Tenth Circuit decision in *Davis*).

217. For a discussion of the formation of the Seminole nation, see *supra* notes 40-48 and accompanying text.



2001, the U.S. government still refuses to recognize them as Seminoles—still defines them, in the eyes of the law, as unworthy of rights today because they were legally considered white people's property yesterday. We claim to have rid the laws of the notion of people as property, but the government is still arguing that the Black Seminoles were property as of 1823, and tracing *current* rights back to people's status at a time when they were considered "property" under the law.<sup>218</sup>

#### V. PARALLELS TO SEMINOLE POLICY: INTELLECTUAL PROPERTY LAW AND POLICY

The actions taken by the U.S. government against the Seminoles illustrate how Americans who benefited from the system of slavery were willing to pursue profits by: (1) creating a racially defined system of slavery; (2) constructing racial classifications and social conditions which fostered racial subordination; (3) defining "property" to encompass human beings; (4) enacting domestic and international laws to protect what they defined as their property; (5) creating and using the diplomatic and military influence of the federal government to enforce these laws; (6) violating both domestic and international law where that appeared more profitable; and (7) using the public treasury to subsidize what they calculated to be their "lost profits."<sup>219</sup>

Racism was not the *reason* the Black Seminoles were hunted down in Florida and enslaved; the profitability of slavery and the slave trade was the primary motivation. However, the creation of racial classifications and a racist ideology made it much easier to implement. That ideology, in turn, took on a life of its own, perpetuating slavery as an institution and justifying distinctions which, even today, are being used to inflict injustices on Black Seminoles.<sup>220</sup> While we no longer use either the law or our military and political power to enforce slavery *per se*, this pattern has parallels in the regime of international property law that the United States is promoting and attempting to incorporate into international law today; parallels that warrant inquiry into whether we are again using our property laws, undergirded by an often unconscious ideology that devalues the lives of

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218. See generally *Black Seminoles File*, *supra* note 26; *News of the Courts*, 43 FED. LAW., Feb. 1996, at 38 ("[T]he Bureau of Indian Affairs had ruled that the Estelusti may not participate in any way in the award or in other benefits, contending that in the 19th century they were slaves, not land owners."). Joseph Singer says about recent Supreme Court decisions cutting back on Indian rights, "Conquest is not something that happened in the distant past which cannot be corrected. Rather, the Court is attempting to conquer Indian nations now by its failure to protect tribal property rights and inherent sovereignty." Singer, *supra* note 4 at 55. Similarly, the government is applying the law of slavery now to the Black Seminoles by failing to protect their rights to an equal share of tribal property.

219. For a discussion of slavery and Seminoles, and the influence of slaveholding interests on law and policy, see *supra* notes 149-90 and accompanying text.

220. For a discussion of the *Davis* case, see *supra* notes 191-218 and accompanying text.

people of color, to support corporate profits at the expense of tremendous human suffering.

#### A. *Expanding the Definition of "Property" Again*

In the late 1700s, when the legal framework of the United States was being forged, it was so important to define "property" to include human beings and to build in legal protections for the institution of slavery, that the very existence of the Union hinged on it.<sup>221</sup> Today our legal system no longer sanctions the defining of people, at least whole persons, as property.<sup>222</sup> Our economic system no longer depends on slave labor, but on private ownership of other forms of property. One of the most important of these is intellectual property.<sup>223</sup> This section begins an inquiry into the parallels between the United States' past protection and promotion of people as property, illustrated by the story of the Black Seminoles, and its current protection of human ideas, creations and body parts as property, and its efforts to impose this regime of intellectual property on the rest of the world.

The U.S. Constitution gives Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>224</sup> The patent law which has been developed pursuant to this authority protects "new and useful inventions, manufactures, compositions of matter, and processes reduced to practice by inventors, as well as designs, new breeds of plants, and genetically engineered strains of plants."<sup>225</sup> A patent confers a right to exclude others from making, selling

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221. For a discussion of the importance of slavery in the U.S. legal system, see *supra* notes 13-17, 181-90 and accompanying text.

222. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.").

However, it may be that parts of people can be bought and sold. According to Patricia Lacy,

In early America, the common law protected cadavers and body parts . . . . There was little questioning of the common law no-property rule until the latter half of this century. Many body parts have become commodities with minimal legal involvement. Blood, semen, hair, teeth, sweat, and urine are the most commonly sold items, but even the sale of skin and muscle from living persons has failed to raise legal controversy

Patricia A. Lacy, Comment, *Gene Patenting: Universal Heritage vs. Reward for Human Effort*, 77 OR. L. REV. 783, 787 (1998). She also notes that the Uniform Anatomical Gift Act, which enables donors to designate body parts for transplanting or for use in medical research, allows "what looks like a property interest in body parts." *Id.* at 790-91.

223. See Keith Aoki, *The Stakes of Intellectual Property Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 259 (David Kairys ed., 3d ed. 1998) (noting that intellectual property is United States' second largest export).

224. U.S. CONST. art. I, § 8.

225. Aoki, *supra* note 223, at 261; see 35 U.S.C. §§ 1-376 (1988 & Supp. V 1993), amended by Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat.

or using an invention in the United States for twenty years.<sup>226</sup> Like other intellectual property rights it is, in Keith Aoki's words, "a state-backed monopoly handed out to individuals or firms."<sup>227</sup>

Patents have been justified as providing inventors with the incentive to engage in research and to disclose their discoveries or creations to the public.<sup>228</sup> This is reflected in the statement of a U.S. Embassy spokesperson about the recent controversy over AIDS drugs in South Africa:<sup>229</sup> "[E]roding intellectual property rights is the wrong way to reduce the AIDS threat as it would undermine the effort to develop new drugs."<sup>230</sup>

This analysis is questionable for several reasons. First, because they are defined by our law as alienable property, "control of valuable copyrighted and patented products tends to concentrate in the hands of vast corporate entities rather than in the hands of individual authors or inventors."<sup>231</sup> Corporations are artificial entities given "personhood" and rights under our law.<sup>232</sup> Because patent rights can be held by corporate entities solely for profit, they may not give their owners any incentive to invest in further research.<sup>233</sup> A second problem with the incentive-for-innovation

4809 (1994) (creating "Act to approve and implement the trade agreements concluded in the Uruguay Round of multilateral trade negotiations.").

226. See 35 U.S.C. § 154 (1988) ("Such grant shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States . . .").

227. Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEGAL STUD. 11, 13 (1998).

228. See Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain*, Part II, 18 COLUM.-VLA J.L. & ARTS 191, 195-96 (1994) (noting justifications for U.S. patent system).

229. For a discussion of patents on AIDS drugs, see *infra* notes 283-315 and accompanying text.

230. *US, Aids and Africa*, THE GUARDIAN, Aug. 12, 1999, available in 1999 WL 23253392.

231. Aoki, *supra* note 223, at 264; see also Keith Aoki, *Considering Multiple and Overlapping Sovereignities: Liberalism, Libertarianism, National Sovereignty, "Global" Intellectual Property, and the Internet*, 5 IND. J. GLOBAL LEGAL STUD. 443, 464 (1998) ("[E]ntities holding increasingly large blocks of intellectual property rights are not nations but private multinational corporations.").

232. Where there is wealth at stake, it appears that we are willing to devalue human beings and divest them of rights; at the same time, and for the same reasons, we are willing to transfer human rights to these abstract "persons." "Because a collective body may have a legal personality distinct from its individual members and, thus, may be the independent subject of legal rights and duties, the corporation has been able to replace the individual as the principal actor in modern commercial life." Yedidia Z. Stern, *Corporate Criminal Personal Liability—Who Is the Corporation?*, 13 J. CORP. L. 125, 125 (1987); see H. HENN & J. ALEXANDER, *LAWS OF CORPORATIONS* 147-49 (3d ed. 1983) (identifying basic legal rights of corporations).

233. In fact, the great profitability of the anti-retroviral drugs used to treat persons infected with HIV may have dampened efforts to find a preventative vaccine. See *AIDS: African Scientists in Vaccine Research; A Highly Politicized Disease*, AFR. ANALYSIS, Dec. 11, 1998, available in 1998 WL 8632215 ("The advent in 1995 of

justification is that in many cases, particularly with respect to AIDS drugs, the research is sponsored and paid for by the government. After the discoveries are made, private corporations are given exclusive marketing agreements. Taxpayers are taking the initial risks and making the initial investments from which private corporations make billions in profits.<sup>234</sup>

Just what is being turned into "property" through this system? The United States Supreme Court said in 1948, that "patents cannot issue for the discovery of the phenomena of nature."<sup>235</sup> Nonetheless, the traditional rule that nature cannot be patented has undergone significant change since 1980, when the Supreme Court held that genetically altered living organisms could be patented because of the changes effected by human intervention.<sup>236</sup> In 1987, the U.S. Patent and Trademark Office announced that "a claim directed to or including within its scope a human being will not be considered to be patentable subject matter . . . ."<sup>237</sup> However, in 1988, Harvard University obtained the first animal patent for a mouse that had been genetically engineered by two professors,<sup>238</sup> and, in recent years, patents have been granted for many life forms, including human DNA sequences.<sup>239</sup>

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antiretroviral drugs reduced AIDS mortality rates in the Western world by 80%. Giant pharmaceutical companies . . . have focused on the cocktail of drug therapies . . . . Research into a cheaper, preventive vaccine was put on the back-burner . . . ."); Paul Ejime, *Experts Say AIDS Vaccine Likely to Elude Africa*, AFR. NEWS SERV., Sept. 9, 1998, available in 1998 WL 17257091 ("Drug companies have no incentive to develop a vaccine for the developing world because they don't see any profit in that," Morna Cornell of South Africa's National AIDS Consortium said.).

234. For a discussion of risks taken and profits made, see *infra* notes 295-97 and accompanying text.

235. *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127, 130 (1948).

236. See generally *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) (allowing the patenting of bacteria which had been genetically enhanced to break down crude oil); Plant Variety Protection Act of 1970, 7 U.S.C. §§ 2321-2582 (1988 & Supp. V 1993), amended by Plant Variety Protection Act Amendments of 1994, Pub. L. No. 103-349, 108 Stat. 3136 (providing patent-like protection to new varieties of sexually reproduced plants).

237. Lacy, *supra* note 222, at 791-92 (quoting statement of Donald J. Quigg, Assistant Secretary & Commissioner of the U.S. PTO, Apr. 7, 1987).

238. See Patent No. 4,736,866 (issued Apr. 12, 1988, to Harvard University as assignee of Professors Philip Leder and Timothy Stewart). After a five-year moratorium, the patent office began issuing animal patents again in 1993. See Aoki, *supra* note 228, at 198 n.36 (noting issuance of patent); Michael B. Landau, *Multicellular Vertebrate Mammals as "Patentable Subject Matter" Under 35 U.S.C. § 101: Promotion of Science and the Useful Arts or an Open Invitation for Abuse?*, 97 DICK. L. REV. 203, 203-04 (1993) (same).

239. See Aoki, *supra* note 223, at 262 ("[A]n increasing number of patents have been granted in living organisms including mammals and recombinant human DNA sequences."). In 1987 Walter Gilbert announced his intention to copyright the genetic sequences he had discovered in connection with the Human Genome Project, a multinational collaboration to identify all of the information coded in human genes. His proposal met with resistance within the scientific community. "Since the genome contains all the information needed to create a human being, copyrighting the genome would be a biotech version of slavery." Aoki, *supra* note 228, at 204-06 (quoting JOEL DAVIS, MAPPING THE CODE: THE

There have been a number of attempts to patent human cell lines of indigenous people without their knowledge or consent. In one notorious episode, the U.S. government in 1993 applied for U.S. and world patents on the cell line of a Guaymi Indian woman from Panama. After international protests from the Guaymi General Congress and others, the U.S. government withdrew its claim. Despite this experience, in 1995 the U.S. Patent Office granted a patent to the National Institutes of Health (NIH) on the T-cell line of a Papua New Guinean and two people from the Solomon Islands.<sup>240</sup>

In February 2000, the Journal of the National Cancer Institute reported, "with the announcement last month that a biotechnology company has sequenced more than 90% of the human genome, the race to license and patent human genes continues to heat up—as does the controversy. The most important and lucrative hoard of intellectual property ever is up for grabs."<sup>241</sup>

When we put these two factors together—(1) intellectual property as something that can be owned and controlled solely for profit, either by individuals or corporate entities; and (2) intellectual property as encompassing not only ideas or knowledge but life forms and body parts—we are disturbingly close to a concept we thought had been discarded with the enactment of the Thirteenth Amendment:<sup>242</sup> the ownership of human beings for profit.<sup>243</sup> The danger, however, is not primarily that people per se will be patented, but in the extension of the regime of intellectual property into realms of nature and culture that have not been viewed as subject to private ownership or sale.

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HUMAN GENOME PROJECT AND THE CHOICES OF MODERN SCIENCE 148 (1990)). Gilbert's company failed, but the issue is still open.

240. Naomi Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 MICH. J. INT'L L. 919, 925 (1996); see Kara H. Ching, *Indigenous Self-Determination in an Age of Genetic Patenting: Recognizing an Emerging Human Rights Norm*, 66 FORDHAM L. REV. 687, 697-702 (1997) (describing U.S. attempts to patent human cell lines of indigenous people).

241. Tom Reynolds, *Gene Patent Race Speeds Ahead Amid Controversy, Concern*, J. NAT'L CANCER INST., Feb. 2, 2000, at 186; see also Leon R. Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, 32 VAL. U. L. REV. 679 (1998) (arguing against cloning humans); Rick Weiss, *Embryo Work Raises Specter of Human Harvesting; Medical Research Teams Draw Closer to Cloning*, WASH. POST, June 14, 1999, at A01, available at 1999 WL 17008686 ("A team of American researchers has quietly begun trying to create the world's first batches of cloned human embryos . . .").

242. See U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States.").

243. This is not limited to humans, but is beginning to encompass all aspects of nature. For a discussion of these developments, see *supra* notes 235-41, *infra* notes 250-53, 270-75 and accompanying text.

### B. *Exporting the U.S. Intellectual Property Regime*

The protections afforded property, as defined in the law of industrialized capitalist nations, includes: (1) individual (human or corporate) ownership; (2) the right to exclude others from use; and (3) alienability, or the right to sell the property.<sup>244</sup> However, our model of intellectual property, which incorporates these assumptions, is not the only or the inevitable one. Referring to the five basic forms of intellectual property—copyrights, patents, trade secrets, trademarks and industrial designs—D'Amato and Long note:

The use of the term “property” itself in describing the bundle of rights represented by these basic forms incorporates an array of philosophical and cultural assumptions about the nature of those rights (i.e., that such rights qualify as intangible “property” over which any one entity has the right of control) that are themselves subject to intense debate.<sup>245</sup>

Property has been conceptualized differently in various social systems, cultures and times. Ruth Gana notes that many indigenous societies are organized around clans or extended family units rather than individuals, rendering the concept of individual ownership meaningless.<sup>246</sup> In societies where transactions are not generally mediated by a market, the commodification of goods may be incomprehensible.<sup>247</sup> “Ownership” may be recognized, but may have different implications. Thus, in some cultures, individuals are recognized as the “owners” of both tangible and intangible goods, but ownership does not necessarily encompass a right to exclude others from use or a right to dispose of the goods.<sup>248</sup>

The purposes of “ownership” are perceived differently as well. Rather than being a source of personal gain, ownership may be more akin to stewardship, with its implications of responsibility for protecting the common good. What we regard as intellectual property, may be protected in

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244. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927) (“The essence of private property is always the right to exclude.”).

245. *Introduction to INTERNATIONAL INTELLECTUAL PROPERTY ANTHOLOGY* 8 Anthony D'Amato & Doris Estelle Long, eds., 1996) [hereinafter ANTHOLOGY]; see Rosemary J. Coombe, *Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conversation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59, 79-80 (1998) (“[I]n communities not fully integrated into market economies, intellectual property is a concept that divides the intellectual from the material, texts from their contexts, and knowledge from social relationships . . .”).

246. See Ruth Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109, 132 (1995) (“Many indigenous societies are not organized around individuals as such but around a clan or other extended unit.”).

247. See *id.* at 135 (noting goods are not commodified in certain cultures).

248. See *id.* at 132-33 (“Rights in intangible goods as well as other goods included the right to be recognized as ‘owner,’ but not the right to exclude others from use.”).

other societies not because it embodies wealth, but because it is regarded as sacred.<sup>249</sup>

Even within societies that have accepted the general notion of intellectual property as something that can be owned, controlled and alienated by individuals, certain types of property have historically been excluded from this regime. These have "typically included chemicals, inventions in agriculture and horticulture, plants, animals, or medical diagnostics,"<sup>250</sup> and attempts to extend the regime of intellectual property rights in these areas have been very controversial. For example, in 1995, W.R. Grace, an American company, received a patent for extracting neem oil.<sup>251</sup> The neem tree and its seed-oil have been used to create pesticides, cosmetics and medicines in India for centuries. India, however, like most "developing" nations, did not grant patents for pharmaceutical and agricultural products, and thus had not issued any patents for neem products.<sup>252</sup> Critics argued that the U.S. patent would:

deny indigenous Indian companies access to the U.S. market, which may be the largest and most lucrative one given the envi-

249. See Coombe, *supra* note 245, at 88 (discussing the controversy over U.S. registration of patent for processing and commercializing ayahuasca, plant sacred to indigenous peoples in Amazon); see also Gana, *supra* note 246, at 133-34 (discussing case of *Milpurrurru v. Indofurn Pty. Ltd.*, from Federal Court of Australia, Dec. 13, 1994) (finding that carpet company infringed rights of aboriginal artists not only by reproducing their designs without permission, but by causing "deep offense" through their inaccurate rendition of designs).

Some argue that within our system of property law these rights should be viewed from a more communal perspective. Referring to Michael Heller's "tragedy of the anti-commons," Keith Aoki notes that the failure to regard some intellectual property as "common" property may result in significant under-utilization of the resource, and suggests that some categories of information are best conceived "as possessing characteristics of public trust property." Aoki, *supra* note 227, at 28-34, 41 (citing Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition From Marx to Markets*, 11 HARV. L. REV. 621 (1998)).

250. Ruth Gana, *Prospects for Developing Countries Under the TRIPS Agreement*, 29 VAND. J. TRANSNAT'L L. 735, 746 (1996).

251. See Emily Marden, *The Neem Tree Patent: International Conflict Over the Commodification of Life*, 22 B.C. INT'L & COMP. L. REV. 279, 283-84 (1999) (discussing issuance of patent to W.R. Grace & Co. on derivative of neem tree). See generally Shayana Kadidal, *Subject-Matter Imperialism? Biodiversity, Foreign Prior Art and the Neem Patent Controversy*, 37 IDEA 371 (1997) (same).

252. Neem has been used in India for ages and studied there for many years, but despite this no patents have ever issued in India on products or processes related to neem, for the simple reason that agricultural and pharmaceutical inventions are specifically excluded from patentability under the laws of most developing nations, India included. Kadidal, *supra* note 251, at 373; see also Marden, *supra* note 251, at 293.

The neem tree is much more than just a plant in India and to many Indians is fundamentally non-commodifiable. Indeed, the tree has both religious and cultural significance throughout India . . . . Some maintain that patenting the neem is analogous to patenting an egg, or some other symbol of common life, ritual, and celebration.

*Id.*

ronmental cache of neem as an “all natural” and “biodegradable” pesticide. Ultimately, Grace’s control over the largest market for the final neem product may allow it to create a monopsony in the cash-crop market for the raw material—all while bidding seed prices out of the reach of neem’s less sophisticated consumers.<sup>253</sup>

Despite the fact that intellectual property is approached in so many different ways around the world, the United States is attempting, quite successfully, to have its regime of rights ensconced in international law, probably because intellectual property now constitutes the United States’ second-largest export.<sup>254</sup> The enforcement of intellectual property rights against foreign users became one of the United States’ top trade policy priorities in the 1980s.<sup>255</sup>

One of the United States’ biggest accomplishments in this realm was the 1994 passage of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).<sup>256</sup> TRIPS came out of the “Uruguay Round” of multilateral trade negotiations under the General Agreement on Tariffs and Trade (“GATT”).<sup>257</sup> The Uruguay Round added intellectual property and trade in services<sup>258</sup> to the subject matter covered by GATT, and established the World Trade Organization (“WTO”) to administer the new rules.<sup>259</sup>

Just as the Creeks were forced to accept the United States’ notion that people of African descent were “property” subject to the terms of the treaties imposed upon them,<sup>260</sup> nations today cannot join the WTO without

253. Kadidal, *supra* note 251, at 377-78; see Roht-Arriaza, *supra* note 240, at 922 (noting that intellectual property is the United States’ second largest export).

254. Aoki, *supra* note 223, at 259. The enforcement of intellectual property rights against foreign users became one of the United States’ top trade priorities in the 1980s. See D’AMATO & LONG, *supra* note 245, at 11.

255. See ANTHOLOGY, *supra* note 245, at 8 (discussing “current system for the international protection of intellectual property”).

256. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1144, 1197 (1994) [hereinafter TRIPS Agreement].

257. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]. GATT, the World Bank and the International Monetary Fund were established in 1947 as part of the Bretton Woods system, whose purpose is to create a worldwide economic structure and includes attempts to open international markets by limiting restrictive national trade policies.

258. See Gana, *supra* note 246, at 110 (noting Uruguay Round’s extension of trade rules to intellectual property). See generally Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT’L L. & POL’Y 769 (1997).

259. Agreement Establishing the Multinational Trade Organization (World Trade Organization) [“WTO Charter”], The Final Act of the Multinational Trade Negotiations (The Uruguay Round), Part II, Annex 2, §§ 26.1, 26.2.

260. For a discussion of mandating slavery through treaties, see *supra* notes 53-58, 94-103 and accompanying text.



agreeing to be bound by the rules of intellectual property embodied in the TRIPS Agreement, a mandatory annex to the WTO Charter.<sup>261</sup> As Aoki says:

with the enactment of TRIPS, Third World countries might be thought of as being coerced into joining GATT, which literally said[:] . . . If you want to export your goods, agricultural and otherwise, you must protect the intellectual properties of other nations.<sup>262</sup>

The TRIPS model differs from previous systems of international intellectual property protection in several ways. Prior protection was governed primarily by the Paris Convention for the Protection of Industrial Property<sup>263</sup> and the Berne Convention for the Protection of Literary and Artistic Works,<sup>264</sup> both administered by the World Intellectual Property Organization. These treaties did not so much create international intellectual property rights as ensure that domestic protection would be extended to the works of foreigners.<sup>265</sup> In contrast, the TRIPS Agreement prescribes substantive rules of what must be protected and how, requiring states "to implement patent systems that utilize the traditional criteria of novelty, nonobviousness, subject matter, and utility and that extend some form of intellectual property protection to plant breeders."<sup>266</sup>

One significant difference between the TRIPS and national systems of intellectual property protection is that domestic legislation, both in the United States and elsewhere, generally strives to balance the economic interests of the property owner with the public interest in access to the information. In contrast, the TRIPS Agreement focuses on the owner's rights and does very little to further the dissemination of knowledge.<sup>267</sup> The TRIPS Agreement also creates a structure of enforcement procedures and

261. The WTO Charter is set up as a "package deal"—three annexes to the WTO Charter are mandatory for all contracting parties. In addition to the TRIPS Agreement, these annexes include the General Agreement on Trade in Services, the Dispute Settlement Rules and the Trade Policy Review Mechanism.

262. Aoki, *supra* note 227, at 20. "Thus, the cotton that passes out of Malaysia at one dollar per pound returns as a t-shirt bearing the trademarked image of Mickey Mouse or Bart Simpson selling for twenty-five dollars." *Id.*

263. Paris Convention for the Protection of Industrial Property, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305.

264. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 168 Consol. T.S. 185, *revised* Nov. 13, 1908, 1 L.N.T.S. 218, *revised* June 2, 1920, 123 L.N.T.S. 233, *revised* June 26, 1948, 331 U.N.T.S. 217, *revised* July 14, 1967, 828 U.N.T.S. 221.

265. *See* Gana, *supra* note 246, at 137-38 (stating both treaties were created to protect individual works of foreigners).

266. Roht-Arriaza, *supra* note 240, at 953.

267. *See* Gana, *supra* note 250, at 742 ("[U]nlike domestic legislation, which seeks to balance the economic interests of owners of intellectual property against the public interest in having access to new knowledge, the TRIPS Agreement is concerned primarily with protection, and not, as such, with dissemination."). For a discussion of some limitations in the areas of public health, nutrition, and devel-

sanctions. Previous disputes were referred to the International Court of Justice; now the WTO, through its mandatory dispute resolution system, will be making substantive legal decisions.<sup>268</sup>

The view promoted by the United States and embodied in the TRIPS Agreement is widely criticized as disproportionately benefiting the developed, *i.e.*, richer, nations.<sup>269</sup> The effect of the TRIPS Agreement on developing countries has been likened to that of colonialism:

Lesser developed countries are wary of the TRIPs agreement because it grants developed countries the power to control international trade issues, consistent with the original goal of the GATT, which was to liberalize trade by preventing lesser developed countries from controlling domestic manufacturing . . . . [It] hinders the lesser developed countries' abilities to boost their economies through exporting and applying their own patent laws. It contributes to the depletion of Southern economies because these countries will have to honor foreign patents, often not recognized under their own patent systems, and buy imported products at high prices from transnational corporations. Thus, these countries would have to pay more for essential drugs and other products.<sup>270</sup>

Contributing to this inequity is the fact that knowledge coming from the formal institutions of western, industrialized countries is protected as "property," but when it comes from informal, traditional systems it is often treated as the "common heritage of humanity."<sup>271</sup> Naomi Roht-Arriaza says, "patentability under current intellectual property law is systematically

opment that were passed over the objections of the United States, see *infra* note 303 and accompanying text.

268. See Gana, *supra* note 246, at 122 (stating dispute resolution is one of many important WTO functions).

269. See Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89, 108-09 (1993) (noting that most developing countries favored resolution of intellectual property disputes under WIPO, while United States and other developed countries favored GATT process).

270. Lakshmi Sarma, *Biopiracy: Twentieth Century Imperialism in the Form of International Agreements*, 13 TEMP. INT'L & COMP. L.J. 107, 124 (1999).

Eli Lilly earns approximately \$100 million per year from anti-leukemia drugs, while the people of Madagascar, where the plants containing these drugs were initially found, get nothing. See Shayana Kadidal, *Plants, Poverty, and Pharmaceutical Patents*, 103 YALE L.J. 223, 224 (1993) (noting amounts Eli Lilly earns in contrast to amount of money Madagascar receives). Merck & Co., another U.S. drug company, has paid Costa Rica a \$1 million fee in exchange for the right to exploit a limited territorial area for plants with pharmaceutical uses. Merck retains the patent rights for any drugs developed under this agreement. See *id.* at 233 (describing Merck's \$1 million dollar agreement with Costa Rica's National Biodiversity Institute); see also Gutterman, *supra* note 269, at 115-23 (noting various arguments for and against intellectual property protection).

271. Laurie Ann Whitt, *Indigenous Peoples, Intellectual Property & The New Imperial Science*, 23 OKLA. CITY U. L. REV. 211, 254 (1998).

biased against the innovations and knowledge of indigenous and farmers' communities."<sup>272</sup> At a U.N.-sponsored conference on the Protection and Conservation of Indigenous Knowledge, the basic points of agreement on the issues faced by the indigenous peoples of Asia stated that:

the indigenous peoples' struggle for self-determination is a very strong counter-force to the intellectual property rights system vis-a-vis indigenous knowledge, wisdom, and culture. Therefore, the struggle for self-determination cannot be separated from the campaign against intellectual property rights systems, particularly their applications on life forms and indigenous knowledge.<sup>273</sup>

Ruth Gana notes, "The impetus behind the TRIPS, an American initiative, is . . . to protect a particular conception of property privileges across national borders. The agreement, simply put, promotes national eco-

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The way the ideological distinction between private rights and the public domain is invoked in biocolonialism illustrates its effectiveness as a process of imperialism. . . . [J]ust as the concept of terra nullius once provided legal and moral cover for the imperial powers' treatment of indigenous peoples, the concept of public domain plays a comparable role in late capitalism. [D]eclaring the intellectual, cultural, and genetic resources to be in the public domain—to belong to everyone as part of the common heritage—sets the stage equally well for their conversion into private property.

*Id.* (citations omitted); see also Michael A. Gollin & Sarah A. Laird, *Global Policies, Local Actions: The Role of National Legislation in Sustainable Biodiversity Prospecting*, 2 B.U. J. SCI. & TECH. L. 16, 32 (1996) (noting that interests of local communities can only be protected if traditional knowledge is recognized as intellectual creation of particular community rather than "common heritage of mankind").

272. Roht-Arriaza, *supra* note 240, at 929-30. One example is the colored cotton that has been developed through centuries of breeding by indigenous groups in Latin America. According to Roht-Arriaza, 15,000 indigenous farmers currently grow colored cotton and over 50,000 women spin and weave it. In 1990, a California scientist, Sally Fox, received a patent for colored cotton; cotton from a seed brought from Latin America in a collection of the United States Department of Agriculture. Because colored cotton is desired by multinational corporations like Levi Strauss and Esprit, the patent may be very lucrative. Under the current regime of rights, Fox will reap the profits, despite the fact that the seed was developed by the indigenous peoples of Latin America and obtained through studies funded by the U.S. government. *Id.* at 924. Roht-Arriaza also gives examples of the endod berry from Ethiopia, sweetening proteins from two African plants; a barley gene cultivated by Ethiopian farmers; and a Brazilian fungus. *Id.*

273. Coombe, *supra* note 245, at 79. There is some argument that the solution is to extend patent protection to the countries providing the plants, indigenous knowledge, etc. The United Nations Draft Declaration on the Rights of Indigenous Peoples includes measures for the protection of "sciences, technologies, and cultural manifestations, including human and, *inter alia*, other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora." Res. 1994/5 at 105, *Draft Declaration on the Rights of Indigenous Peoples*, U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/56 (1994) at 112; see also Coombe, *supra* note 245, at 83 (arguing generally that intellectual property rights should be treated as international human rights).

monic interests and social values in the legitimizing form of treaty law.”<sup>274</sup> Thus, in order to participate in the multilateral trade system, nations must now change their national laws to conform to the model of intellectual property recognized by European and American legal systems.<sup>275</sup>

In addition to defining which aspects of human knowledge will be considered “property,” the United States is also attempting, as it did in the case of slavery, to have international law incorporate its positions on which kinds of property can be legally owned.<sup>276</sup> Thus, in the case of property the United States considers “legal”—*i.e.*, property it will protect, such as patents on medicinal drugs—it has imposed its views on other countries through international law where possible, and through force, preferably economic, where necessary.<sup>277</sup> However, to the extent that it defines possession of certain property as “illegal”—*i.e.*, property the legal system will not recognize or protect, such as cocaine or marijuana—it works to get that definition embodied in international law<sup>278</sup> and, where international law fails to conform to the United States’ position, it has engaged in what many consider to be violations of international law to prevent the ownership of such property.<sup>279</sup>

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274. Gana, *supra* note 246, at 120.

275. *See id.* (“[C]ountries must develop an intellectual property jurisprudence substantially similar to what currently exists in the United States and Europe in order to nurture the success of their new intellectual property laws.”).

276. For a discussion of slaves as “property” in the context of international law, see *supra* notes 150-60 and accompanying text.

277. For a discussion of the United States’ imposition of its views on other countries, see *infra* notes 298-311 and accompanying text.

278. *See generally* Jimmy Gurule, *The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances—A Ten Year Perspective: Is International Cooperation Merely Illusory?*, 22 FORDHAM INT’L L.J. 74 (1998) (advocating more aggressive use of U.S. courts to enforce compliance with Convention); Bruce Zagaris & Elizabeth Kingma, *Asset Forfeiture International and Foreign Law: An Emerging Regime*, 5 EMORY INT’L L. REV. 445 (1991) (noting difficulties in using asset forfeiture laws to curb drug trafficking caused by differences in legal systems); Bruce Zagaris & Sheila M. Castilla, *Constructing an International Financial Enforcement Subregime: The Implementation of Anti-Money-Laundering Policy*, 19 BROOK. J. INT’L L. 871 (1993) (advocating need for more uniform international law and enforcement).

279. In December 1989, approximately 24,000 U.S. troops invaded Panama, inflicting significant casualties, both civilian and military, and destroying entire neighborhoods. General Manuel Noriega, head of the Panamanian state, was arrested by U.S. forces, brought to the United States, and tried for criminal conspiracy to violate U.S. law. *See United States v. Noriega*, 683 F. Supp. 1373, 1373 (S.D. Fla. 1988) (stating facts of case); *see also* Mark Andrew Sherman, *An Inquiry Regarding the International and Domestic Legal Problems Presented in United States v. Noriega*, 20 U. MIAMI INTER-AM. L. REV. 393, 395 (1989) (“*Noriega* represents the ultimate intersection of United States domestic law and foreign policy.”).

Renown international law scholar Louis Henkin says, “With regret, I conclude that the invasion of Panama by the United States was a clear violation of international law . . . . The United States did not even have a color of justification for this invasion.” Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT’L L. 293, 312-13 (1991). Others have argued the legality of the invasion into Panama. *See generally* Anthony D’Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT’L L. 516 (1990) (arguing

As seen in the history of the Seminoles, the U.S. imposed treaties on the Creeks, under which the Creeks were forced to concede to U.S. notions of property—as applied to both land and people—and monies owed them were taken to protect the profits of those who claimed to own that property.<sup>280</sup> This system was forced on the Creeks through the U.S. legal system, through international law where possible, and—when those avenues failed—through the United States' overwhelming size and strength. Even a cursory look at the TRIPS Agreement illustrates that something very similar is being done to other cultures today through the imposition of intellectual property laws that, in many instances, undermine the social structures and value systems of other cultures<sup>281</sup> and promote the economic exploitation of the peoples in those societies.<sup>282</sup> A particularly stark example of the damage done through this process is seen in the struggle of poor nations to obtain AIDS drugs.

### C. AIDS Drugs: Hostage to Profits

Slavery, as institutionalized in the United States, was a system in which large economic interests bought, held and sold people as property. The resources of the federal government were employed to protect that investment, despite the knowledge that millions of people would suffer and die as a result of defining and protecting property interests in this manner. Recent decisions to use the resources of the federal government to protect property in AIDS drugs are having a similar effect.

In 1999, approximately 2.6 million people died from AIDS. Eighty-five percent of them lived in Africa. Another 5.6 million people became infected with HIV in 1999.<sup>283</sup> Cumulatively, sub-Saharan Africa has seen 13.7 million of the 16.3 million deaths attributed to AIDS.<sup>284</sup> In South

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that America's invasion into Panama was legal). See generally Mark Andrew Sherman, *United States International Drug Control Policy, Extradition, and the Rule of Law in Columbia*, 15 NOVA L. REV. 661 (1991) (describing how U.S. international drug policy often involves coercion, impeding its effectiveness).

280. For a discussion of these treaties, see *supra* notes 92-106, 112, 134 and accompanying text.

281. See Gana, *supra* note 246, at 141. ("For many of these societies, the difficulty in introducing western copyright principles is that these principles attempt to overturn social values which are centuries old.")

282. The intellectual property agreements do not spell out the cultural values they embody but—just as the original Constitution never mentioned the word "slavery"—this does not make them any less effective in imposing these values.

283. See Jeffrey Bartholet, *The Plague Years*, NEWSWEEK, Jan. 17, 2000, at 34 (stating most AIDS victims are located in Africa). At the Thirteenth International AIDS Conference in Durban, South Africa, in July 2000, it was reported that 34.5 million people are HIV-infected; 25 million of those people live in Africa; nearly 19 million have already died from AIDS; and by 2010, about 44 million children in the developing world will have lost one or both parents, with seventy percent of those adult deaths caused by AIDS. See Ed Susman, "No end, no relief in sight for AIDS in Third World," BIOTECHNOLOGY NEWSWATCH, Aug. 7, 2000, 1.

284. See *Mapping the AIDS Epidemic's Hot Zone*, NEWSWEEK, Jan. 17, 2000, at 37 ("The HIV plague is at its most devastating in 29 nations of Africa . . .").

Africa, thirteen percent of the adults aged fifteen to forty-nine are infected, and the average life expectancy, which would have been age sixty-four but for AIDS, has fallen to age forty-seven.<sup>285</sup> Certain combinations of what are known as anti-retroviral drugs are effective in preventing those infected with HIV from developing full-blown AIDS, and have dramatically extended life expectancy. Such drug therapy, however, costs about U.S. \$12,000 per year at current market prices, clearly out of reach for most South Africans, whose average annual income is under U.S. \$3,000.<sup>286</sup>

Faced with this crisis, in 1997, the South African government amended its Medicines and Related Substances Act to permit compulsory licensing and parallel importation of more affordable AIDS drugs.<sup>287</sup> Compulsory licensing allows a government to use a patent within its country without the patent holder's authorization, but for a fee which generally runs from one to ten percent of sales, thus allowing the local production of generic drugs.<sup>288</sup> This can reduce the amount consumers pay for these drugs by as much as ninety percent.<sup>289</sup> Parallel importation would allow the South African government to import the drugs from third countries, where the prices may be significantly cheaper.<sup>290</sup> For example, in 1995,

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285. See *id.* (charting effect of AIDS throughout Africa). According to Someshwar Singh, 16% of the South African population is HIV-positive, including one-quarter of pregnant women in the poorest provinces. Someshwar Singh, *Only the Rich Can Live*, WORLD PRESS REV., Feb. 2000, at 30 (referencing study reported in October 1999 issue of Dorset journal, *The Corner House*).

286. See L.J. Davis, *A Deadly Dearth of Drugs*, MOTHER JONES Jan./Feb. 2000, at 31 (noting that drugs used in West for AIDS are not affordable to most South Africans). Sales of these drugs come to approximately \$3 billion dollars a year. In addition, drugs to treat the chronic infections that can kill people with AIDS cost \$1200 to \$1800 per year. See Singh, *supra* note 285, at 30 (reporting sales of anti-retroviral drugs and costs of further treatment for AIDS).

287. See Davis, *supra* note 286, at 31 (describing South Africa's amendment to its Medicines and Related Substances Act); see also *South Africa Passes Controversial Bill Allowing Parallel Imports of Pharmaceuticals*, 12 J. PROPRIETARY RTS., Dec. 1997, at 26 (stating that South Africa passed "controversial" legislation entitled, *The Medicines and Related Substances Control Amendment*).

288. See Singh, *supra* note 285, at 30 (explaining effects of compulsory licensing).

A compulsory license is defined as the permission to use intellectual property compelled by the government to accomplish a political or social objective. The issuance of compulsory licenses is a safeguard used by some nations to restrict the use of intellectual property rights of right holders, because of public policy, national emergency, or other official reasons.

Hicks & Holbein, *supra* note 258, at 812.

289. See Davis, *supra* note 286, at 31 (stating benefits that poorer nations would receive from compulsory licensing). Singh reports that compulsory licensing of generic AIDS drugs could reduce the price by fifty to ninety percent. See Singh, *supra* note 285, at 30 ("Compulsory licensing can reduce the price of drugs by as much as 90 percent.").

290. See Davis, *supra* note 286, at 31 (noting that parallel importing would allow South Africa to import drugs for less than South African drug companies would charge).

SmithKline Beecham charged the following prices for an identical amount of its antibiotic Amoxil: \$8 in Pakistan, \$14 in Canada, \$36 in the United States, \$40 in Indonesia and \$60 in Germany.<sup>291</sup>

In response to the new South African law, over forty pharmaceutical companies jointly filed suit in South Africa, preventing the law from taking effect.<sup>292</sup> The companies claimed, in the words of David Warr, associate director of tax and trade policy at Bristol-Myers Squibb, that "compulsory licensing and parallel imports expropriate our patent rights."<sup>293</sup> There are several problems with this argument. First, there are the general concerns, discussed above,<sup>294</sup> with the legitimacy of imposing such a rights regime on other nations.

A second problem is that the knowledge protected by these "rights" is often derived from research done at taxpayers' expense. One of the first drugs that South Africa tried to manufacture was Taxol, used to fight AIDS-related Kaposi's sarcoma.<sup>295</sup> Taxol was developed by the U.S. government's National Institutes of Health, which holds the patent, but gave Bristol-Myers Squibb an exclusive marketing agreement. Bristol-Myers Squibb made more than \$1 billion from Taxol sales in 1998.<sup>296</sup> Marketing rights for many of the other drugs used to treat AIDS were also given to private corporations after the drugs were developed by the U.S. government.<sup>297</sup>

A third problem with the pharmaceutical companies' "rights" argument is that what South Africa proposed to do fell squarely within the "national emergency" exception allowed by the TRIPS Agreement,<sup>298</sup> and the South African government repeatedly emphasized that it intended to

291. See *Blood and Gore: Office of the U.S. Trade Representative Goes Too far in Promoting Interests of U.S. Drug Companies Abroad*, THE NATION, July 19, 1999, at 16 (stating price of Amoxil in various countries). A recent study reported that the "price of life-saving medicine in Africa, where the need is greatest and the poverty is worst, is often higher than in Europe and North America." For example, 100 units of Nevirapine, which prevents mother-to-child transmission of HIV costs \$430 in Norway and \$874 in Kenya. See Donald G. McNeil, Jr., *Prices for Medicine Are Exorbitant in Africa, Study Says*, N.Y. TIMES, June 17, 2000, at A6.

292. See Davis, *supra* note 286, at 31 ("More than 40 major drug companies jointly filed in South Africa's Constitutional Court, barring the amendment from taking effect . . .").

293. See *id.*

294. For a discussion of these concerns, see *supra* notes 245-53 and accompanying text.

295. See Davis, *supra* note 286, at 31 ("Among the first drugs South Africa tried to manufacture was Taxol . . .").

296. See *id.* (noting profits gained by Bristol-Myers Squibb from Taxol).

297. See *id.* (noting that Taxol and other marketing rights were given to private corporations by government).

298. "Article 31 [of the TRIPS Agreement] specifies the conditions constituting grounds for member nations to grant such compulsory licenses, such as public health, nutrition, other reasons of public interest, national emergency, and public non-commercial use." Hicks & Holbein, *supra* note 258, at 788.

abide by international law.<sup>299</sup> Nonetheless, for two years, the U.S. government did all it could to pressure the South African government into changing its law. U.S. representatives lobbied the South African Parliament. Congress suspended foreign aid to South Africa. South Africa was denied certain tariff breaks, and it was put on a "watch list" for possible further sanctions.<sup>300</sup> Vice President Gore, as co-chair of the trade-related U.S./South Africa Binational Commission, made South Africa's Medicine Act the focus of his talks with now-President Thabo Mbeki, pushing for concessions from South Africa.<sup>301</sup> "According to a February 5, 1999, report to Congress from the office of the U.S. Trade Representative, 'All relevant agencies of the U.S. government . . . have been engaged in an assiduous, concerted campaign' to get South Africa to capitulate."<sup>302</sup> In the meantime, administration officials "tried to kill a World Health Organization resolution that urged member nations 'to ensure that public health interests are paramount in pharmaceutical and health policies.'"<sup>303</sup>

After consumer and AIDS activists brought pressure on Gore and the U.S. administration, Gore, who was by then running for President, changed his public position.<sup>304</sup> In September 1999, the pharmaceutical companies announced they had suspended their suit against South Africa,<sup>305</sup> and the U.S. Trade Representative decided that further sanctions were not necessary because South Africa had "agreed to abide by interna-

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299. See Davis, *supra* note 286, at 31 ("South Africa's health minister has said repeatedly that South Africa would abide by international law.").

300. See *SA and US Resolve Pharmaceutical Row*, SAPA (South African Press Association), Sept. 17, 1999, available in 1999 WL 21598773 (noting South Africa was on U.S. "watch list" for second year "over concerns that it was infringing intellectual property trade rights" and that U.S. drug companies had lobbied to bump South Africa to higher category on watch list which could have led to trade sanctions); see also Davis, *supra* note 286, at 32 (stating that U.S. had placed South Africa on "watch list").

301. See Davis, *supra* note 286, at 32 ("On at least two occasions—in 1998 and again in early 1999—Gore made the Medicines Act amendment the focus of his talks with Thabo Mbeki, now South Africa's president.").

302. *Id.*; see also Sara M. Ford, *Compulsory Licensing Provisions Under the TRIPS Agreement: Balancing Pills and Patents*, 15 AM. U. INT'L L. REV. 941, 954 (2000) ("[T]he manner in which the USTR set forth its objections revealed how the pharmaceutical industry has exerted pressure on the United States to adhere to a different standard other than that agreed in the international TRIPS agreement.").

303. *Id.*

304. Activists disrupted the June 16, 1999 speech in which Gore announced his candidacy and continued to show up at various campaign events. Ralph Nader also criticized Gore directly, saying, "Gore's not the man he was when he was senator." Davis, *supra* note 286, at 33; see also Doug Ireland, *AIDS Drugs for Africa*, THE NATION, Oct. 4, 1999, at 5.

305. However, the South African Pharmaceutical Association apparently only sees this as a "ceasefire in the drug war rather than a solution," claiming that the South African law is still not wholly compliant with TRIPS. *SA/USA Cease-Fire in Drug War; Updated Story*, MARKETLETTER, Sept. 17, 1999, available in 1999 WL 9321739.



tional law."<sup>306</sup> During the intervening two years, however, approximately 300,000 South Africans had died of AIDS.<sup>307</sup>

South Africa is not alone in this dilemma. Over the past few years, the Office of the U.S. Trade Representative has threatened at least seven countries with trade sanctions if they allowed generic substitutes for Taxol to be sold in their markets.<sup>308</sup> One of these countries was Thailand:

After the Asian financial crisis, Thailand was in no position to afford AIDS drugs sold at American prices. Local health groups accordingly lobbied the Thai and U.S. governments to license local companies to manufacture anti-HIV drugs and drugs to treat opportunistic AIDS infections. They pointed out that many lives would be saved and that the patent holder, instead of receiving virtually nothing from the Thai market, would benefit from a steady if unspectacular stream of compensatory payments.<sup>309</sup>

The United States, as the actual patent holder of many of these drugs, could have easily supported this position. Instead, it pressured the Thai government not only into dropping its plans for compulsory licensing of AIDS-related drugs, but to change its patent and trade laws to outlaw compulsory licensing altogether.<sup>310</sup> U.S. representatives threatened to reduce Thailand's access to the U.S. market for its jewelry exports, one of Thailand's major sources of foreign exchange, while at the same time offering to cut tariffs on Thai jewelry and wood products entering the U.S. market.<sup>311</sup>

What we see in these examples is a willingness to sacrifice the lives of millions of people, overwhelmingly African people, for profits—profits which depend entirely on the definition of certain knowledge as private property—and a further willingness to subsidize and promote those property interests through the law, both domestic and international, and through the power of the federal government. This system is presented in

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306. Davis, *supra* note 286, at 33; see also Ford, *supra* note 302, at 955-56. Of course, South Africa's position had always been that it was abiding by international law; it is unclear from the settlement whether the United States "actually acknowledged the legality of compulsory licensing or whether it merely backed down due to harsh political pressure." Ford, *supra* note 302, at 956.

307. See Davis, *supra* note 286, at 33 (estimating that approximately 300,000 South Africans have died of AIDS during that two year period of U.S. pressure on South Africa).

308. See *Blood and Gore*, *supra* note 291, at 16 ("U.S. Trade Representative . . . has threatened at least seven countries with trade sanctions if they allow generic substitutes for the cancer drug Taxol onto domestic markets.").

309. Singh, *supra* note 285, at 30. See generally Rosemary Sweeney, *The U.S. Push for Worldwide Patent Protection for Drugs Meets the AIDS Crisis in Thailand: A Devastating Collision*, 9 PAC. RIM L. & POL. J. 445 (2000) (arguing that U.S. should allow Thailand to make generic versions of AIDS drugs).

310. See Singh, *supra* note 285, at 30 (describing U.S. government's effort to frustrate plans for compulsory licensing of AIDS-related drugs in Thailand).

311. See *id.* (same).

a way that makes it appear lawful, if not reasonable, to deny affordable drugs to tens of millions of AIDS victims. A New York Times editorial noted that control over these drugs is control over whether those infected with HIV will live or die; they are shackled to the disease and, for many, the United States holds the key. Yet, "[t]he drug companies, and the Clinton Administration's trade negotiators, have fought the efforts of third-world countries to manufacture cheap versions of still-patented drugs . . . ."<sup>312</sup> The editorial goes on to point out that while the government and the drug companies argue that this system enables the "greater good," in fact, it simply enables greater profits.<sup>313</sup>

While Washington says it objects to technicalities in the new South African law, the larger reason trade officials have pressed so hard is that the industry fears South Africa could set precedents, within the world's trade rules, for the manufacture of cheap drugs . . . . The desires of America's pharmaceutical companies have been the overwhelming force driving American policy on the issue of drugs in poor nations. Surely the needs of 35 million people infected with H.I.V. worldwide should count for more.<sup>314</sup>

## VI. CONCLUSION: RACE, PROPERTY AND PROFITS

This Essay began with the Black Seminoles and the U.S. government's attempts to enslave them because it is a story that illustrates the extent to which race and racism have been intertwined with international law and foreign relations since the earliest days of the nation. Looking under the surface of this narrative, we see that international law was both used and abused, not to further a racist ideology per se, but to protect and expand the profitability of a certain kind of property, human property. Racism was used to justify the definition of people as property, and to disguise the human and social costs of protecting profits in this manner.

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312. . Editorial, *Drugs for AIDS in Africa*, N.Y. TIMES, Aug. 23, 1999, at A14, available at 1999 WL 30478020.

313. *See id.* (stating that pharmaceutical companies fear loss of profits if poorer nations are allowed to manufacture drugs cheaply).

314. *Id.* In the face of mounting political pressure, President Clinton issued an executive order declaring that the U.S. government would not interfere with countries in sub-Saharan Africa that may violate U.S. patent law in order to provide AIDS drugs at lower prices. "The language of the executive order is nearly identical to an amendment that was deleted at the behest of the drug industry from an African trade bill that Congress [was] considering. . . ." Neil A. Lewis, *Clinton Issues Order to Ease Availability of AIDS Drugs in Africa*, N.Y. TIMES, May 11, 2000, at A7. In July 2000 a number of pharmaceutical companies began announcing plans to offer anti-retroviral drugs at little or no cost to developing countries for a few years. *HIV/AIDS II: Company Offers Free Drugs to Some Nations*, AM. HEALTH LINE, July 10, 2000. While such steps are important, they do not address the structural causes of the problem.

This story, it would appear, ended nearly 150 years ago; but part of its power is in exposing contemporary truths we might not otherwise have seen. When we look at *Davis* in light of this history, we can see how the law of slavery is still being used to determine property rights. The Black Seminole plaintiffs in this case are today being denied compensation otherwise due because their ancestors were once defined as property under U.S. law. But what we can learn from this story is not limited to what is happening to the direct descendants of its main characters. It can also let us see, by analogy, ways in which race is still informing our international law and foreign policy and is still being used to shape that law and policy to maximize the profitability of particular forms of property, regardless of the human cost.

In the debate over the international enforcement of intellectual property rights, we see parallels to the history of the international enforcement of our slaveholding laws on the Seminoles. Both cases involve the expansion of what constitutes “property” under the law. In the 1700s, it was stretched to encompass people, in the form of slaves. In the year 2000, we no longer recognize the ownership of whole people, but we are expanding the law to subdivide people and allow ownership of component parts, such as thoughts or genes, as well as many components of culture, collective knowledge, and plant and animal life. The property holders have gotten their interests protected by domestic law, and have then pressured the federal government to apply the controversial notion of property internationally, thereby greatly enhancing the profitability of their property.

In the 1700s and 1800s, the resources of the federal government were used to benefit certain large economic interests, and similarly today, governmental resources are being invested in research or in negotiating international agreements that benefit particular corporate interests. In both eras, those who benefit claim that recognition and protection of their version of property is the only way to promote a broader material well-being—the well-being not only of their group or class or nation, but also of humanity generally—stressing the importance of conquering land, peoples or disease in the interest of universal material progress. In both cases, it has been acknowledged that promoting this “general” welfare requires accepting some subordination of the welfare of certain people, generally poor people; generally people of color.

In both cases, the subordination of the rights of some people to life and liberty have been subordinated to a corporate right to profit, and that subordination has been justified and promoted by our legacy of race-related theories and attitudes. Those who are harmed by the system are portrayed as less worthy because they are “less civilized” or “unproductive” or “inevitably poor;” justifications which, in turn, create, sustain and perpetuate racism. In retrospect, the position taken two hundred years ago that Black people were presumed to be slaves, and therefore property,

seems ridiculous.<sup>315</sup> But the arguments of the drug companies are taken seriously—it is not considered ridiculous for them to presume that millions of black lives are worth less than their profits.<sup>316</sup> Ruth Gana says:

[W]hat the internationalization of intellectual property implies, ultimately, is that there is only one way to participate in the international economy and that is by playing in accordance with prescribed rules, regardless of its impact on a group of peoples. It is a message that is not unfamiliar in the history of world affairs, and yet it is a message which, so history informs us, has caused devastation of unimagined proportions to human society.<sup>317</sup>

The pattern and its effects are the same: property rights are carved out to protect profits; those rights are enshrined in the law; the putative property holders insist on using the power of the state to enforce (and subsidize) those rights; the harm caused by this regime is minimized or rationalized through racist ideology, sometimes subtle and sometimes blatant; and that ideology is then used to justify violating the law when that is deemed necessary to preserve the property and its profitability.

Both the story of the Black Seminoles and that of AIDS drugs in Africa support Joseph Singer's call to "rethink the meaning of property, shifting our focus from title and ownership to the ways in which property rules shape human relationships."<sup>318</sup> They also call on us to rethink the ways in which emerging rules of international law shape human relationships. To do so, we must recognize the role that racism plays in maintaining current structures of legal rights. What Joseph Singer says about federal Indian law is true for international law, as well as U.S. law: "It is an entryway to understanding the complex relations between property and sovereign power in United States law. Exploration of this relation will re-

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315. Even where current injustices are the direct result of that position, as in the case of the Black Seminoles in Oklahoma, its acknowledgment is carefully avoided. Thus, the district court in the *Davis* case did not address how there came to be Black Seminoles, but instead dismissed based on its inability to join a necessary party, the Seminole Nation. Ironically, the U.S. government now argues that the suit must be dismissed out of respect for the sovereign immunity of the Seminole Nation. See *Davis v. United States*, 192 F.3d 951, 955-62 (10th Cir. 1999) (reversing district court).

316. While the international law protecting intellectual property rights is being expanded, recognized international human rights such as the right to life and to medical care are being diminished, or at least ignored. See generally Audrey R. Chapman, *Conceptualizing the Right to Health: A Violations Approach*, 65 TENN. L. REV. 389 (1998) (noting that "the United States is the only major democracy that fails to recognize a universal entitlement to health care" and identifying violations of right to health as defined under various international instruments); Steven D. Jamar, *The International Human Right to Health*, 22 S.U. L. REV. 1 (1994) (identifying scope, content, and sources of core human right to health).

317. Gana, *supra* note 246, at 142.

318. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1303 (1996).

veal how law allocates both property rights and political power along lines of racial caste.”<sup>319</sup>

The construction of race and the institutionalization of race-based privilege and subordination allows those who benefit from the current economic structure and its legal regime, as well as those who think they benefit and those who one day hope to do so, to ignore the human realities by dividing people into “really human” and “not-so-human.”<sup>320</sup> In this construction, the lives of those who are “not-so-human” are worth less. The human cost, the human horror, is filtered through the abstraction of the economic interest, the corporate person, but that is still not enough if we see the persons affected as fully human. Racism adds the extra filter, veiling the human dimensions of the horror.<sup>321</sup>

This is what critical race theory can add to international law—an understanding of how, when and why racism allows or facilitates or promotes these sort of human injustices. Seemingly disparate areas (domestic race relations versus international law) and apparently contradictory tendencies (support for the global rule of law versus a willingness to disregard international law) can be understood as parts of a coherent whole when we consider how racial hierarchy is invoked to make it easier to both use and abuse law toward the end of protecting property and its profits. Such an analysis can help us see that it is not just about the law, but about the imposition of a different valuing of human life onto the workings of the law.

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319. Singer, *supra* note 4, at 7.

320. As Singer says, in the context of property rights justifying the taking of Indian lands, “If those who benefit from this history of injustice claim a vested right to its benefits, they should be aware that what they claim is a right to the benefits of a system of racial hierarchy.” *Id.* at 45.

321. Thus, for example, just after World War II, when Europe was in disarray, the social infrastructure was destroyed, and so many people were homeless and desperately poor, there could easily have been a plague. If there had been, and the United States controlled the treatment for it, would we have withheld medicines because the people could not afford its full price? If their governments could afford to make it, but not to pay our royalties for the formulas, would we force those governments to sit idly by and watch their people die? It seems unlikely. In addition to an understanding of law, politics and economics, one must have an analysis that takes racism into account.